IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEOFFREY WELLS,

Plaintiff,

vs.

BOSTON AVENUE REALTY, an Oklahoma general partnership comprised Joseph L.Hull, Jr. and Joseph L. Hull III; WORLD PRODUCTIONS, INCORPORATED, an Oklahoma corporation; TIMOTHY BARRAZA; and 39 PRODUCTIONS, INC., an Oklahoma corporation; corporation; all d/b/a SRO,

Defendants.

39 PRODUCTIONS, INC., an Oklahoma corporation,

Cross-Plaintiff,

vs.

DALLAS FIRE INSURANCE COMPANY, INC., a Texas corporation,

Cross-Defendant.

No. 95-C-1252-E

JUDGMENT

In accord with the Order of this date sustaining Defendants' Motions for Summary Judgment, the Court enters judgment in favor of Defendants, Boston Avenue Realty, World Productions, Inc., and 39 Productions, Inc., and against the Plaintiff, Geoffrey Wells. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated this 16th day of August, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEOFFREY WELLS,

Plaintiff,

vs.

No. 95-C-1252-E

BOSTON AVENUE REALTY, an Oklahoma general partnership comprised Joseph L. Hull, JR. and Joseph L. Hull, III; WORLD PRODUCTIONS, INCORPORATED, an Oklahoma corporation; TIMOTHY BARRAZA; and 39 PRODUCTIONS, INC., an Oklahoma corporation; all d/b/a SRO

Defendants.

39 PRODUCTIONS, INC., an Oklahoma corporation,

Cross-Plaintiff,

vs.

DALLAS FIRE INSURANCE COMPANY, INC., a Texas corporation,

Cross-Defendant.

ORDER

Before the Court, pursuant to Fed. R. Civ. P. 56, are motions for summary judgment submitted by Defendants BOSTON AVENUE REALITY ("BAR") (Docket no. 10), WORLD PRODUCTIONS, INCORPORATED ("WORLD") (Docket no. 15), and 39 PRODUCTIONS, INC. ("TPI") (Docket no. 14).

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I. UNDISPUTED FACTS

In the early hours of January 1, 1994, GEOFFREY WELLS ("WELLS") arrived at Standing Room Only ("SRO"), a local nightclub operated by TPI. Wells never entered the SRO building, but stood on a patio outside and conversed with an acquaintance. While at this location, WELLS became involved in altercation with a patron of SRO who assaulted WELLS and then left the premises. After the altercation, WELLS and his acquaintance moved from the patio area to a second location at a parking lot adjacent to the SRO building. Soon thereafter, the patron who assaulted WELLS returned to the parking lot area and struck WELLS again.

II. ANALYSIS

Each Defendant has moved the Court for summary judgment on grounds that it did not owe WELLS a duty to protect him from the third party criminal assault. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In determining whether summary judgment is appropriate, the Court must view the evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). However, "[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317(1986).

A. Duty of TPI

The parties dispute whether TPI owed WELLS the higher duty owed to an invitee, or only

the lower duty owed to a licensee. Resolving the dispute over WELLS' status is unnecessary because even if WELLS held the status of an invitee, TPI did not have a duty to protect WELLS from the assault he experienced. A business owner "is not an insurer of the safety of others and is not required to prevent all injury occurring on the property." Taylor v. Hynson, 856 P.2d 278, 281 (Okla. 1993). Moreover, the invitor is not required to protect invitees from criminal assaults by others . . . unless the invitor "knows or has reason to know that the acts of the third person are occurring, or about to occur." Id. (citations omitted). However, "[w]hen an invitor has knowledge that an invitee is in imminent danger, the invitee must act reasonably to prevent injury." Id.

WELLS suggests that TPI possessed knowledge that its invitees were in danger yet failed to act reasonably in preventing the assault. WELLS argues that the assault was foreseeable to TPI because of criminal activity previously occurring on the premises. Additionally, WELLS suggests that the assault was a foreseeable consequence of TPI's business of serving alcoholic beverages. Finally, WELLS claims that TPI acquired actual knowledge of the assault as it was occurring. In support of his first and second claims, WELLS argues that comment f of the Restatement (Second) of Torts, § 344 (1976) is applicable to this case. Comment f states:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally, or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

The Oklahoma Supreme Court has adopted the first part of comment f which indicates that

an invitor incurs a duty when he has knowledge that acts by third parties are occurring or about to occur. E.g. Taylor, 856 P.2d at 281 However, the Oklahoma Supreme Court has declined to apply the latter part of comment f, upon which, WELLS relies. McMillin v. Barton-Robison Convoy Co., 78 P.2d 789, 790 (Okla. 1938). Discussing an employer's duty to an employee, the McMillin Court declined to impose a "general duty to protect his employees from the assaults of criminals." Id. Although, the McMillin Court recognized that "exceptional circumstances . . . might give rise to such a duty[,]" it specifically rejected McMillin's argument that the nature of defendant's business or its past experience with crime constitute such exceptional circumstances. Id. By rejecting these factors, the McMillin Court implicitly rejected the grounds now enumerated in the latter portion of comment f to § 344. See Id.

In a subsequent case involving a business invitor's duty to an invitee, the Oklahoma Supreme Court rejected an invitation to overrule McMillin, but rather, found the earlier opinion "dispositive" on the issue of the invitor's duty. Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 964 (Okla. 1976). The McMillin holding was again endorsed by the Oklahoma Supreme Court in 1993. Taylor, 856 P.2d 282. Moreover, the Court of Appeals recently relied on the McMillin holding and determined that a "business invitor will not be liable for intentional or criminal acts of third parties unless the invitor had knowledge the act "is occurring or about to occur.'" Folmar v. Marriott, 918 P.2d 86, 89 (Okla. App. 1996). As Oklahoma has declined to adopt the rationale of the latter part of comment f of § 344, the location or character of TPI's business or TPI's past experience are all insufficient to establish a duty upon TPI to protect an invitee from an assault by a third person. Consequently, WELL' first and second attempts to demonstrate that TPI possessed the knowledge that imposes a duty to protect WELLS must fail.

WELLS' third claim alleges that a duty should be imposed upon TPI because it acquired actual knowledge of the assault. The only evidence that supports this assertion is hearsay contained in an affidavit submitted by WELL' in response to the Defendants' motions for summary judgment. This Court, however, is prohibited from considering inadmissible hearsay evidence in its evaluation of WELLS' opposition to summary judgment. Treff v. Galetka, 74 F.3d 191, 195 (10th Cir. 1996). As WELLS has failed to properly introduce any evidence which supports this allegation, the Court is unable to consider the claim that TPI possessed actual knowledge of the assault.

The Court finds that WELLS has not introduced any evidence that TPI possessed the knowledge Oklahoma requires to impose a duty upon TPI to afford WELLS protection against the third party assault. As there is no dispute as to any material facts, TPI's motion for summary judgment is granted.

B. Duty of WORLD

The SRO nightclub operated by TPI is located on premises owned by BAR and leased to WORLD. WORLD claims that it has subleased the SRO premises to TPI, but WELLS disputes whether the lease between WORLD and TPI was executed. Consequently, WELLS contends that WORLD owed him a duty to protect him from the assault as landlord in control of the property, or as the "operator" of the premises. Whether WORLD was landlord or tenant of the SRO premises is unnecessary to determine, because the Court finds that WORLD did not owe WELLS a duty to protect him from the third party assault under either status.

The Oklahoma Supreme Court has not addressed a landlord's duty to protect a tenant's business invitee from criminal acts of third parties. Courts have generally held that a "landlord is not liable in damages to the business invitees of the tenant." Skelton v. Sinclair Refining Co., 375 P.2d

948 , 951(Okla. 1996). However, "where premises are leased for public or semi-public purposes and at the time of leasing there is a condition which renders the premises unsafe for the purpose intended and the landlord knows, or by the exercise of reasonable diligence, should have known of the condition, he is liable to his tenant's invited business patrons or customers who are injured by reason of such unsafe condition." Weaver v. U.S., 334 F.2d 319, 320 (10th Cir. 1964)(construing Oklahoma law). This liability is limited "to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee and would not be observed by him in the exercise of ordinary care." Id. The Court is not persuaded that an assault by a third person is such a defect or condition.

WELLS contends that WORLD maintained control over the common parking area where the second assault occurred. Even if WORLD controlled the parking area, the highest duty owed to WELLS is that owed to an invitee. McMillin and progeny indicates that a business owner only has a duty to protect his invitee from a third party assault if he possesses knowledge the act is occurring or about to occur. Although the Oklahoma Supreme Court has not extended this same duty to an invitor's landlord that controls common areas, it is inconceivable that a landlord should incur liability when possessing less knowledge than required of a business operator who owns the property. Consequently, the Court finds that a landlord only has a duty to protect a tenant's invitees from third party assaults that occur in common areas he controls if he has knowledge the act is occurring or about to occur.[1] As WELLS has not introduced any evidence that WORLD possessed such

[1].The parties direct the Court to Oklahoma authority, which addresses a residential landlord's duty to it tenant. Lay v. Dworman, 732 P.2d 455 (Okla. 1993). The Lay Court discussed the duties which can arise under the landlord-tenant relationship. Id. at 458-59. The Landlord owes his tenant a duty to "use reasonable care to maintain the common areas of the premises in such a manner that the likelihood of criminal activity is not

knowledge, WORLD did not have a duty to protect WELLS. WORLD's motion for summary judgment is granted.

C. Duty of BAR

WELLS claims that BAR, the owner of the premises, owed a duty to WELLS as a landlord of the property. Additionally, WELLS claims that BAR retained control of the parking area, and as such, owed him a duty as the "operator" of the premises. To impose liability on BAR under either status, WELLS must establish that BAR possessed knowledge that the assault was occurring or about to occur. As WELLS has failed to introduce any evidence that BAR possessed this knowledge, the Court finds that BAR did not owe WELLS the duty to protect him from the assault. Consequently, BAR's motion for summary judgment is granted.

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reasonably enhanced by the condition of those premises." Id. Additionally, a duty can be owed to "maintain the actual security of the leased premises themselves" provided the landlord has retained control of the security aspects of the premises and criminal acts resulting from his omission are foreseeable. Id. "The corner stones of this duty are (1) foreseeability and (2) exclusivity of control." Cordes v. Wood, 918 P.2d 76, 78-79 (Okla. 1996). "Where the landlord does not have exclusive control over the ineffective device or the premises, courts have held that the landlord will not be held liable." Id. at 80. The duties discussed in the Lay and Cordes opinions arise out of the landlord-tenant relationship. These holdings are not applicable to the present case where WELLS' status is, at most, an invitee.

III. CONCLUSION

ACCORDINGLY, IT IS ORDERED that BOSTON AVENUE REALTY's motion for summary judgment (Docket no. 10), WORLD PRODUCTION, INCORPORATED's motion for summary judgment (Docket no. 15), and 39 PRODUCTIONS, INC.'s motion for summary judgment (Docket no. 14) are each **granted**.

SO ORDERED THIS 16th day of August, 1996.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. PROCEEDS IN THE AMOUNT OF THREE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED ELEVEN AND 62/100 DOLLARS ($370,811.62) FROM SALE OF REAL PROPERTY LOCATED AT: SEVEN SAILVIEW ROAD, MOORESVILLE, IREDELL COUNTY, NORTH CAROLINA, a/k/a LOT SEVEN (7), ALEXANDER ISLAND SUBDIVISION, IREDELL COUNTY, NORTH CAROLINA, Defendant.	CIVIL ACTION NO. 96-C-0196-H

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant currency, and all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 12th day of March 1996, alleging that the defendant currency, to-wit:

> PROCEEDS IN THE AMOUNT OF THREE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED ELEVEN AND 62/100 DOLLARS ($370,811.62) FROM SALE OF REAL PROPERTY LOCATED AT:

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SEVEN SAILVIEW ROAD, MOORESVILLE, IREDELL COUNTY, NORTH CAROLINA, a/k/a LOT SEVEN (7), ALEXANDER ISLAND SUBDIVISION, IREDELL COUNTY, NORTH CAROLINA,

is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A), because there is probable cause to believe they are proceeds involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or proceeds traceable thereto, and pursuant to 18 U.S.C. § 981(a)(1)(C), because they constitute proceeds or are derived from proceeds traceable to a violation of 18 U.S.C. § 1343.

Warrant of Arrest and Seizure was issued by the Clerk of this Court on the 20th day of March, 1996, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and that the United States Marshal for the Western District of North Carolina published for three consecutive weeks in the Statesville Record, Statesville, Iredell County, North Carolina, the district in which the defendant currency is located.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on the defendant currency and all known

potential individuals or entities with standing to file a claim to the defendant currency, as follows:

The Sum Of $370,811.62 From Sale of Real Property Located At: Seven Sailview Road, Mooresville, Iredell County, North Carolina, a/k/a Lot 7, Alexander Island Subdivision, Iredell County, North Carolina.	**Served: April 1, 1996**
STEVEN SECHREST by serving: Danielle D Sechrest (wife) 17608 River Ford Drive (residence) Davidson, North Carolina 28036	**Served: April 17, 1996**
DANIELLE D. SECHREST 17608 River Ford Drive Davidson, North Carolina 28036	**Served: April 17, 1996**

USMS 285s reflecting the service upon the defendant currency and on Steven Sechrest and Danielle D. Sechrest, the only individuals or entities known to have standing to file a claim to the defendant currency, are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed on May 9, 16, and 23, 1996, and in the Statesville Record, Statesville, Iredell County, North Carolina, the county in which the defendant currency is located, on May 10, 17, and 24, 1996. Proof of Publication was filed on June 13, 1996.

No claims in respect to the defendant currency have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to the defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant currency, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant currency:

PROCEEDS IN THE AMOUNT OF THREE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED ELEVEN AND 62/100 DOLLARS ($370,811.62) FROM SALE OF REAL PROPERTY LOCATED AT:

SEVEN SAILVIEW ROAD, MOORESVILLE, IREDELL COUNTY, NORTH CAROLINA, a/k/a LOT SEVEN (7), ALEXANDER ISLAND SUBDIVISION, IREDELL COUNTY, NORTH CAROLINA,

and that the defendant currency above described be, and it hereby is, forfeited to the United States of America for disposition according to law.

SVEN E. HOLMES, Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
vs.)
) CIVIL ACTION NO. 96-CV-183-H
BRYAN R. BAKER,)
)
Defendant.)

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $2,564.72, plus accrued interest of $1,637.10 , plus administrative costs in the amount of $1,362.80, plus interest thereafter at the rate of 9% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation

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of the defendant that Bryan R. Baker will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 10th day of August, 1996, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $200.00, and a like sum on or before the 10th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Debt Collection Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Bryan R. Baker, in the principal amount of $2,564.72, plus accrued interest in the amount of $1,637.10, plus interest at the rate of 9% until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD, OBA # 11168
Assistant United States Attorney

BRYAN R. BAKER

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AT&T CORP.,

Plaintiff,

v.

CIS TECHNOLOGIES, INC.,

Defendant.

Case No. 95-C-1091H

ORDER DISMISSING CLAIMS
OF AT&T CORP. WITH PREJUDICE

THIS MATTER comes before this Court on this 19th day of August, 1996. The Plaintiff, AT&T Corp., makes application to dismiss its claims against CIS Technologies, Inc. with prejudice. This Court finds that the claims of AT&T Corp. have been settled among the parties, and approves the dismissal.

IT IS THEREFORE ORDERED that the claims of AT&T Corp. are hereby dismissed with prejudice.

JUDGE

APPROVED:

Jonathan C. Neff, Attorney for AT&T Corp.

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DATE 8-20-96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**FILED**
	)	
vs.	)	AUG 19 1996
	)	Phil Lombardi, Clerk
CHRIS LYNN TOWELL; DEANNA LYNN TOWELL; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	U.S. DISTRICT COURT
	)	NORTHERN DISTRICT OF OKLAHOMA
	)	
	)	**Civil Case No. 95-C 978H**
Defendants.	)	

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure filed March 18, 1996 is vacated, and that this action shall be dismissed without prejudice.

Dated this 19TH day of AUGUST, 1996.

UNITED STATES DISTRICT JUDGE

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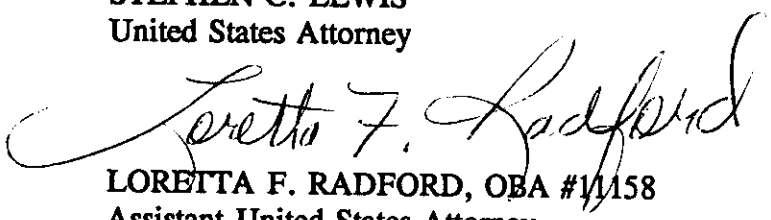
APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE HOME-STAKE OIL & GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION,	)	
Plaintiffs,	)	
vs.	)	Case No. 94-C-1187K
FEDERAL INSURANCE COMPANY,	)	
Defendant.	)	

ORDER OF DISMISSAL

This matter comes on for hearing on the joint Stipulation of the Plaintiffs, The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation, and Defendant, Federal Insurance Company, for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, Federal Insurance Company, pursuant to said Stipulation. The Court further finds that the counter-claim filed by Defendant, Federal Insurance company should also be dismissed with prejudice to the filing of a future action as to Plaintiffs, The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, Federal Insurance Company, be and is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs and attorneys' fees.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the counter-claim against Plaintiffs, The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation, be and is hereby dismissed with prejudice to the filing of a future action against said Plaintiffs, the parties to bear their own respective costs and attorneys' fees.

Dated this 19TH day of ~~July~~ AUGUST, 1996.

UNITED STATES DISTRICT COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDY LEE KEITH, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 96-C-80-H
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus petition as a mixed petition and Petitioner's motion for leave to amend his petition to delete his unexhausted ground for habeas relief. Petitioner concurs with the State's contention that his second ground may not have been fully exhausted in state court.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion for leave to amend his petition (docket #6) is **granted** and Petitioner's second ground for habeas relief is **dismissed** at this time. Petitioner is reminded, however, that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Rose v. Lundy, 455 U.S. 509, 521 (1982).

Respondent's motion to dismiss the petition as a mixed petition (docket #4) is **denied as moot**. Respondent shall **respond** to Petitioner's first ground on or before twenty (20) days from the

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date of filing of this order. Petitioner may reply within twenty (20) days thereafter.

IT IS SO ORDERED this 19TH day of AUGUST, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KELVIN JAMES,

Plaintiff,

v.

METROPOLITAN TULSA TRANSIT AUTHORITY,

Defendant.

Case No. 95-C-162-H

ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment (Docket #22).

I.

Plaintiff was employed by Defendant as a bus driver from September 4, 1990, through September 30, 1993. In the course of this employment, Plaintiff was injured on September 29, 1992 when a "destination board" on a bus fell on him. Plaintiff remained off work after that injury until he was scheduled for a physical examination on October 26, 1992. When the examining physician determined that Plaintiff was not physically able to drive a bus under Department of Transportation ("DOT") guidelines, he did not resume his duties. Shortly thereafter, Plaintiff began receiving temporary total disability benefits through the Workers' Compensation Court. The court terminated these benefits on March 8, 1993, when a medical examination of Plaintiff revealed that he was no longer "temporarily and totally disabled".

On February 27, 1993, shortly before the termination of Plaintiff's workers' compensation

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benefits, Plaintiff was approved for long-term disability benefits under an employee benefit plan operated by Defendant. On March 22, 1993, Plaintiff obtained a release to return to work from Dr. Terence Murphy. However, Plaintiff failed a DOT return-to-work physical conducted on the following day by a doctor in Occupational Medical Services. As a result of this physical, Plaintiff remained off work while drawing the long-term disability benefits provided by Defendant.

The terms and conditions of Plaintiff's employment were governed by a collective bargaining agreement ("CBA") between Defendant and Plaintiff's union. Article 11.4 of that agreement provided as follows:

> If an employee is absent from work due to illness or injury or leave of absence for medical reasons, the Authority will fund benefits on behalf of this employee for eighteen (18) months, but the employee's seniority will not be affected. If an employee is absent due to an on-the-job injury, the Authority will fund benefits on behalf of this employee for twelve (12) months, but the employee's seniority shall not be affected. If the insurance carrier permits, an employee may continue his/her group insurance benefits in effect eighteen (18) months by paying the full cost of such benefits to the Authority, after the Authority has ceased funding the benefits.

Def.'s Ex. 8 (emphasis added). In a letter dated September 10, 1993, Defendant notified Plaintiff that, pursuant to the terms of article 11.4, Defendant would cease funding his benefits on September 30, 1993, the one-year anniversary of his injury. On September 30, 1993, Defendant dropped Plaintiff from its employment rolls.

Almost three weeks later, Plaintiff obtained a return-to-work form signed by Dr. Murphy and dated October 19, 1993, which stated, "In my opinion, Mr. Kelvin James is able to return to work October 21, 1993." The following day, Plaintiff contacted the president of his local union, who went with him to see Defendant's Director of Operations, Jim Smith. Mr. Smith told them that Plaintiff had been dropped from the employment rolls on September 30. Pursuant to the CBA, Plaintiff's

union filed a grievance which was ultimately submitted to an arbitrator. The arbitrator made no finding whatsoever regarding Plaintiff's physical condition on September 30, 1996. However, he concluded that the CBA required a "third doctor" to examine an employee seeking to return to work when the doctors for the employee and the company disagreed as to the employee's fitness. Accordingly, the arbitrator held that both Plaintiff and Defendant had failed to comply with the CBA when they did not seek a third doctor's opinion in March 1993. Based upon this conclusion, the arbitrator ordered another evaluation of Plaintiff, noting that if the examining physician determined that Plaintiff was fit for work, he would be returned to work. However, because the arbitrator determined that both sides were at fault in not seeking a third doctor's opinion in March 1993, he held that Plaintiff was not eligible for back pay. Plaintiff passed the physical examination and returned to work on February 27, 1995, with his seniority in tact. He brought the instant action on February 21, 1995, alleging that he was wrongfully discharged on the basis of disability and race.

II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III.

Plaintiff claims that he was discharged on the basis of a "perceived disability" in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213. In order to establish a claim under the ADA, Plaintiff must prove that:

1. he is a disabled person within the meaning of the ADA;

2. he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and

3. the employer terminated him because of his disability.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995) (citation omitted). For purposes of the ADA:

> The term "disability" means, with respect to an individual -- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of having such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); see Bolton v. Scrivner, Inc., 36 F.2d 939, 942 (10th Cir. 1994). Plaintiff claims that Defendant regarded him as having a disability and that such perception motivated his discharge on September 30, 1993. The record suggests that Plaintiff was dropped from Defendant's employment rolls because he had been on disability leave for a year. However, the Court need not determine whether Plaintiff was terminated because of an actual or a perceived disability, because the Court concludes that Plaintiff has failed to establish that he was able to perform the essential functions of his job on September 30, 1993.

In March 1993, Plaintiff attempted to return to work but failed to pass the DOT physical required by Defendant. From that time until the date of his termination, Plaintiff indicated no further ability or desire to return to work and, in fact, continued to receive long-term disability benefits from

Defendant. The medical evidence offered by Plaintiff in the instant case results from examinations of Plaintiff in October and November of 1993, thus it cannot constitute reliable evidence of Plaintiff's physical condition at the end of September, 1993. Because the record contains no evidence whatsoever that Plaintiff was able to perform the essential functions of his job with or without reasonable accommodation on September 30, 1993, the Court concludes as a matter of law that Plaintiff would be unable to establish at trial that he was terminated in violation of the ADA.

IV.

Plaintiff also contends that his termination resulted from race discrimination in violation of Title VII. In support of this contention, Plaintiff alleges that Defendant's Operations Director Jim Smith made comments to two other individuals expressing a "distaste for inter-racial marriages." Pl.'s Aff. at 1. Plaintiff does not allege that he is a party to an inter-racial marriage. He also relies upon examples of white, non-disabled individuals who were "separated" from Defendant and subsequently re-hired.

Title VII claims are evaluated under the burden-shifting scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

> Under that scheme, the plaintiff has the initial burden of establishing a prima facie case of discrimination. If the plaintiff succeeds, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the employment action. Should the defendant succeed in meeting that burden, the plaintiff has the burden of proving, by a preponderance of the evidence, that the employment action was motivated by illegal discrimination, and that can be done either through direct evidence, or indirectly by showing that the reasons proffered by the defendant are a pretext for discrimination.

Shapilia v. Los Alamos Nat'l Laboratory, 992 F.2d 1033, 1036 (10th Cir. 1993) (citing McDonnell

Douglas, 411 U.S. at 802-04). Assuming arguendo that Plaintiff has established a prima facie case of discrimination as articulated in the McDonnell Douglas cases, Defendant has met its burden of articulating a legitimate, nondiscriminatory reason for Plaintiff's discharge. Defendant claims that it discharged Plaintiff at the expiration of the 12-month disability period pursuant to the provisions of the CBA. The Court concludes that Plaintiff has not offered any evidence that raises a genuine issue of fact that Defendant's stated reason is pretextual. See Cone v. Longmont United Hospital Ass'n, 14 F.3d 526, 530 (10th Cir. 1994).

Thus, Plaintiff has failed to set forth material facts supporting his claims under the ADA or Title VII. Accordingly, Defendant's Motion for Summary Judgment (Docket #22) is hereby granted.

IT IS SO ORDERED.

This 19TH day of August, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KELVIN JAMES,

Plaintiff,

v.

METROPOLITAN TULSA TRANSIT AUTHORITY,

Defendant.

Case No. 95-C-162-H

JUDGMENT

This Court entered an order on August 19, 1996, granting Defendant's Motion for Summary Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 19TH day of August, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAMORU KAWADA, Individually, and MAMORU KAWADA, as Shareholder of NANCI INTERNATIONAL JAPAN, a Japanese corporation,

Plaintiff,

v.

ELIAS MASSO, Individually, and as President of NANCI CORPORATION INTERNATIONAL; NANCI MASSO, Individually and as Chairman of NANCI INTERNATIONAL JAPAN; and NANCI CORPORATION INTERNATIONAL, an Oklahoma corporation,

Defendants.

No. 95-CV-108-H

STIPULATION OF JUDGMENT

As stipulated to by the parties herein, judgment is entered in favor of the Plaintiff on his claims and against the Defendants, individually and in their corporate capacity, in the amount of $70,000, plus interest calculated at the prime rate as of the date of the judgment. Said interest will accrue on the judgment until paid. Judgment is hereby also entered against Defendants and in favor of Plaintiff on Defendant's counterclaim. Defendants will take nothing on their counterclaims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is entered in Plaintiff's favor on his claims and on Defendants' counterclaims in the sum of $70,000 plus interest.

S/ SVEN ERIK HOLMES

United States District Judge

APPROVAL AS TO FORM:

MARTHANDA J. BECKWORTH /K. Clark Phipps
Attorney for Plaintiff

ROSEMARY BURGHER
Attorney for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK, MARIE JETT, KENT CARAWAY, SWANNIE TARBEL, DARTON J. ZINK, JILL HOTTIWATA, and MICHAEL BARTELL, Trustees of THE JOHN ZINK FOUNDATION,

Plaintiffs,

vs.

A. SCOTT BROGNA, W.T. MOORE, MAYABB OIL COMPANY, UNIQUE OIL CO., and PAYSTONE OIL COMPANY,

Defendants.

Case No. 95-C-0018-W

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and in accordance with the written Settlement Agreement dated July 15, 1996, Plaintiffs John Zink, Marie Jett, Kent Caraway, Swannie Tarbel, Darton J. Zink, Jill Hottiwata, and Michael Bartell, Trustees of the John Zink Foundation, Trustees of the John Zink Foundation ("Plaintiffs"), and Defendants A. Scott Brogna, W. T. Moore, Mayabb Oil Company, Unique Oil Company, and Paystone Oil Company ("Defendants"), hereby dismiss all claims and counterclaims in the captioned action with prejudice. All parties agree to bear their own costs and attorneys fees incurred in this action.

Dated this 19th day of August, 1996.

BOONE, SMITH, DAVIS, HURST
& DICKMAN

Scott R. Rowland (OBA #11498)
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ATTORNEY FOR PLAINTIFFS

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ATTORNEY FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROLYN ANN TIERNEY,
SS# 454-88-4344

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

No. 95-C-896-J

ORDER[1/]

Plaintiff, Carol Ann Tierney, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts that the Commissioner failed to (1) follow the five-step sequential evaluation, (2) give appropriate weight to the testimony of treating physicians, (3) consider whether Plaintiff's combination of impairments met the Listings, and (4) consider all of the evidence. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[2/] Plaintiff filed an application for disability insurance benefits on October 5, 1993. [R. at 27]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge R.J. Payne (hereafter, "ALJ") was held September 13, 1994. [R. at 310]. By order dated December 27, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 14]. Plaintiff appealed the ALJ's decision to the Appeals Council. On July 25, 1996, the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 5].

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I. PLAINTIFF'S BACKGROUND

Plaintiff was born on July 8, 1948, and was 46 at the time of her hearing. [R. at 27, 310]. Plaintiff previously worked as a nurse's aide in the summer of 1971 until early 1972. [R. at 54].

In her disability report Plaintiff claimed she was disabled due to blindness, hypoglycemia, epilepsy, a nervous condition, back problems, an irritated colon, depression, conjunctivitis, dysmenorrhea, thyroid difficulties, and carpal tunnel syndrome. [R. at 58]. However, Plaintiff's earning record established that Plaintiff met the insured status under the Social Security Act only pursuant to Rule IV, and only through December 31, 1978. See 20 C.F.R. § 404.130(e); [R. at 18, 48-50, 313]. Therefore, Plaintiff can claim benefits for disability only if Plaintiff met the requirements for statutory blindness prior to December 31, 1978. See 20 C.F.R. §§ 404.130(e), 404.1581.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that

of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[3/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

[3/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

Based on Plaintiff's work and earnings history, the ALJ noted that Plaintiff qualified for disability benefits only if she met the definition for statutory blindness on or before December 31, 1978. [R. at 18]. The ALJ determined that Plaintiff did not meet the requirements for statutory blindness prior to December 31, 1978, and was therefore not disabled. [R. at 20-21].

IV. REVIEW

FIVE-STEP SEQUENTIAL EVALUATION

Plaintiff initially asserts that the Commissioner erred because the ALJ failed to follow the five-step sequential evaluation process. Plaintiff is referring to the general procedure established by the Commissioner for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. However, Plaintiff's argument ignores the Commissioner's method for determining disability insured status.

The determination of insured status is explained in 20 C.F.R. § 404.130.

[4/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

> We have four different rules for determining if you are insured for purposes of establishing a period of disability or becoming entitled to disability insurance benefits. To have disability insured status, you must meet one of these rules and you must be fully insured . . . .

20 C.F.R. § 404.130. Rule IV governs disability for statutory blindness. An individual who does not qualify for disability insured status for Rules I-III may still qualify for insured status under Rule IV. To qualify under Rule IV, an individual must be disabled by blindness as defined in the regulations and be "fully insured" as defined in the rules.

Plaintiff's work activity report indicates that she worked during the summer of 1971, until early 1972 as a nursing aide. [R. at 54]. Plaintiff's earning record reveals that she earned $1,969.68 in 1966, $274.09 in 1967, $208.33 in 1968, $920.00 in 1971, and $116.65 in 1972. [R. at 48-50]. At the hearing before the ALJ, the ALJ explained that "[t]he record reflects that the earnings' requirements for Title II Benefits have been met through December 31, 1978, and that the earnings' requirements have been met for statutory blindness only. . . . In order to find disability, I'll have to find that you were disabled on or before December 31, 1978, and it has to be for statutory blindness." [R. at 312-313]. The ALJ additionally explained to Plaintiff and Plaintiff's non-attorney representative. "Mr. Laird, I just wanted to make sure that you understand that the issue will be restricted to statutory blindness and that the claimant will have to show that she met those requirements on or before December 31, 1978." [R. at 313]. Plaintiff's representative responded, "Yes, Your Honor." [R. at 313].

On appeal, Plaintiff does not challenge the ALJ's finding that due to Plaintiff's earning record she qualified for disability only if she met the statutory requirements for blindness. Plaintiff does not assert that the number of quarters she was credited with working was incorrect,[5/] and Plaintiff does not assert that she qualified for insured status pursuant to another Rule. Plaintiff asserts only that the ALJ erred by not evaluating Plaintiff's disability claim under the five-sequential steps. However, a claim for statutory blindness is not evaluated pursuant to the five step process. A claimant is disabled under Rule IV only if the claimant meets the requirements of statutory blindness pursuant to 20 C.F.R. § 404. 1581.

> We will consider you blind under the law for a period of disability and for payment of disability insurance benefits if we determine that you are statutorily blind. Statutory blindness is defined in the law as central visual acuity of 20/200 or less in the better eye with the use of correcting lens. An eye which has a limitation in the field of vision so that the widest diameter of the visual field subtends an angle no greater than 20 degrees is considered to have a central visual acuity of 20/200 or less. . . .

20 C.F.R. § 404.1581. See also 42 U.S.C. § 416(i)(1)(B). To qualify for statutory blindness, Plaintiff must meet the definition for blindness. In accordance with the regulations, if Plaintiff meets the definition, she is disabled. If she does not meet the regulations, she is not disabled. See also Adams v. Bowen, 872 F.2d 926 (9th Cir. 1989), cert denied 439 U.S. 851 (1989) (the ALJ noted that the claimant was clearly "visually dysfunctional" and would be disabled if she was "specially insured," but she

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[5/] Plaintiff submitted a single page explaining that because she had not worked in 1983, the amounts that the Social Security Administration had credited to her for that year were incorrect. [R. at 51-52].

was not disabled under Rule IV). The ALJ did not err by not following the five-step sequential evaluation process.

TREATING PHYSICIAN

Plaintiff additionally asserts that the ALJ did not give appropriate weight to the evidence supplied by Plaintiff's treating physician. Plaintiff contends that if Plaintiff's treating physician's opinions and the testimony of the expert witness are properly considered, Plaintiff meets the definition of statutory blindness and is disabled.

Generally, a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). In addition, the opinion of a specialist may be given greater weight that the opinion of a non-specialist. Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995); 20 C.F.R. § 404.1527(d)(2)-(6).

As noted above the requirements for disability due to blindness are statutory. To qualify for disability under the definition of statutory blindness, Plaintiff must either have central visual acuity of 20/200 or less in the better eye with the use of correcting lens, or limitation in the field of vision of an eye so that the widest

diameter of the visual field subtends an angle no greater than 20 degrees. See 20 C.F.R. § 404.1581; 42 U.S.C. § 416(i)(1)(B).

The record is clear that based on Plaintiff's visual acuity, she does not qualify for statutory blindness. Plaintiff's corrected visual acuity for her left eye ranged from 20/40 to 20/80. [R. at 194-203, 301, 316]. In addition, Plaintiff's treating eye doctor, Richard S. Grisham, M.D., noted that it was safe for Plaintiff to drive. [R. at 196]. Consequently, to qualify for statutory blindness, Plaintiff must establish that her visual field angle is less than 20 degrees.

Plaintiff's cardiologist did note that "I estimate by confrontation crude testing that she has only about 10 degree fields on either side." [R. at 100]. The ALJ discounted the cardiologist's report because, according to the doctor's report, his "data" was based on "confrontation crude testing." In addition, the ALJ noted that the record contained no support or tests for the cardiologist's statement.

In one letter dated February 23, 1971, Thomas E. Acers, M.D., noted that "[t]here was a 5 degree concentric constriction to all test objects and to various testing distances. However, the record does not contain or indicate the test objects, testing distances, or provide any documentary support for Dr. Acers statement. The ALJ and Robert P. Hughes, M.D. discounted the letter because it was not supported in the record.

Plaintiff additionally suggests that Dr. Hughes testified that Plaintiff did meet the statutory requirements for blindness. Dr. Hughes did state that "[i]f you accept the five degree concentric constriction at all distances, that does qualify." [R. at

320]. However, Dr. Hughes also noted that the requirements for proof of impairment of peripheral vision are very specific,[6/] and that the record contains no plot of the visual field or other records to support Dr. Hughes' statement. [R. at 319-20]. Dr. Hughes concluded that Plaintiff did not meet the statutory requirement for visual acuity. [R. at 316]. Dr. Hughes also noted that the record did not contain a visual or plotted field to support Plaintiff's doctor's statements concerning Plaintiff's visual field. [R. at 319-20].

The ALJ concluded that no credible objective findings supported Plaintiff's visual field loss. In addition, a consultative examination conducted on October 18, 1990 by Cole D. Pittman, M.D., found that Plaintiff's peripheral vision in her left eye was 180 degrees. [R. at 301]. The consultative exam report contained the appropriate visual field plots. [R. at 302]. The ALJ additionally observed that due to the asserted "progressive nature" of Plaintiff's condition, one could reasonably conclude that Plaintiff's vision loss was less severe prior to December 31, 1978 (Plaintiff's cut-off date for disability). Furthermore, the ALJ noted that Plaintiff

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[6/] Dr. Hughes testified "[T]he statute requires a very specific type of field to be done -- 3 millimeter wide test object at 330 centimeters. . . . Impairment of peripheral vision may result; contraction may be either symmetrical or irregular. Extent of the remaining peripheral vision field determined by the usual parametric methods at a distance of 330 millimeters under illumination, and not less than 7 foot gantlets. For the phakic eye a 3 millimeter wide disc test object will be used; for the aphakic eye, a 6 millimeter wide test object will be used. They don't give you much leeway, and they do not accept the newer electronic or computerized visual fields." [R. at 319].

reported she was able to drive during daylight hours, and that such an ability was inconsistent with statutory blindness.[7/] [R. at 66, 134, 148].

Substantial evidence supports the conclusions of the ALJ, and the Court cannot find that the ALJ gave inappropriate weight to the reports referenced by Plaintiff.

MEET OR EQUAL A LISTING

Plaintiff asserts that the ALJ applied the incorrect legal standard by refusing to evaluate Plaintiff's asserted impairments in combination and by not explaining how Plaintiff did not "meet or equal" a Listing.

As noted above, due to Plaintiff's limited insured status, she qualifies for disability only if she is statutorily blind. Although the Listings do address blindness, the ALJ, under Rule IV, is not evaluating Plaintiff under the "Listings," but is determining whether Plaintiff meets the definition for blindness under 20 C.F.R. § 404.1581.

In Adams v. Bowen, 872 F.2d 926 (9th Cir. 1989), cert denied 439 U.S. 851 (1989), the plaintiff qualified for disability benefits only if she could establish she was statutorily blind. The plaintiff's visual acuity was 20/50. However, the plaintiff had difficulty processing visual information, and could not "see well enough to put a staple in the corner of a piece of paper . . . ." The ALJ noted that although the plaintiff

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7/ See, e.g. Morton III, David A., M.D., Med. Proof of Soc. Sec. Disab. § 2.3F (1983) ("No matter what eye tests seem to show, how blind could a claimant be who reads and writes well, drives, and goes hunting?"). In a physical examination by Samuel Shaddock, M.D., he reported that Plaintiff "wears glasses, drives a car, and is able to arrange her hair, read, etc., without any apparent difficulty." [R. at 148].

would have qualified for disability if she met a different insured status, she was not disabled because she did not meet the statutory requirements for blindness. On appeal, the plaintiff contended that although the statute "set forth a specific definition of blindness for purposes of determining entitlement to disability benefits, 'Congress cannot have intended that disability benefits be awarded to those who are effectively blind because of damage to their eyes while denying benefits to those who suffer the same impairment because of damage to the brain.'" Id. at 928. In essence Adams [plaintiff] advocates the use of an equivalency requirement for the condition of blindness described in the statute." Id. The Ninth Circuit analyzed the equivalency argument urged by the plaintiff, and rejected it.

> Nothing in the legislative history of the Social Security Amendments of 1967, including Section 416(i)(1)(B), suggests that Congress intended anything but a narrow reading of the statute's unambiguous language. The Senate Report states only that "[i]n order to qualify for benefits a person would have to have vision of 20/200 or less." Although the statute purposely "liberalized" the previous definition of blindness "[i]n recognition of the economic hardships faced by blind persons, there is no indication that the equivalency requirement urged by Adams was intended or even contemplated by Congress. Congress chose a certain and exact rule; we are reluctant to engraft upon it a more flexible standard that is inherently more difficult to administer.

Id. at 928-29 (citations omitted, quotation in original).

Plaintiff suggests no reason for interpreting the statutory blindness as a "meet or equal" standard. In accordance with the court's decision in Adams, this Court declines to expand the requirements of statutory blindness.

"LACK OF EVIDENCE"

Plaintiff asserts that the Secretary improperly relied upon a "lack of evidence" in determining that Plaintiff was not disabled. However, a review of the record and the ALJ's decision indicates that substantial evidence exists to support the ALJ's determination that Plaintiff was not disabled.

Plaintiff refers to Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993) and states that the "absence of evidence is not evidence." The Court in Thompson did conclude that an "absence of evidence is not evidence." Id. at 1490. However, the facts in Thompson are different from this case. The Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." Id. In this case, assuming the record contained no other evidence to support the conclusion of the ALJ, a consultative examination indicated that Plaintiff's visual acuity in her left eye was 20/40 and her peripheral vision for her left eye was 180 degrees. [R. at 301-02]. Consequently, the record contains adequate support to satisfy Thompson.

Plaintiff additionally asserts that the ALJ lacked substantial evidence to support his decision. However, as noted above, the record contains substantial evidence to support the decision of the ALJ. In addition to the consultative report, Plaintiff's own doctors indicated that her vision in her left eye was at least 20/50 to 20/80. Although two of Plaintiff's doctors indicated Plaintiff's visual field was less than twenty degrees, one doctor admitted that this was based on "crude testing" while the

other doctor gave no indication of the type of tests conducted to support his conclusion. In addition, a consultative report indicated that Plaintiff's peripheral vision in her left eye was 180 degrees. Plaintiff acknowledged that she drove during daylight hours, took care of herself and her house, was able to wear glasses, read with no difficulty, and participated in volunteer organizations. [R. at 66, 148, 228]. The record contains substantial evidence to support the decision of the ALJ.

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 16 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
DATE 8/20/96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN ANN TIERNEY,
SS# 454-88-4344

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

No. 95-C-896-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of Commissioner has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 16th day of August 1996.

Sam A. Joyner
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES WAGNON and
LORALEE WAGNON, Husband
and Wife,

Plaintiffs,

vs.

STATE FARM FIRE AND
CASUALTY COMPANY,

Defendant.

Case Number: 94-C-972-B

ENTERED ON DOCKET
DATE AUG 19 1996

ORDER DETERMINING PLAINTIFFS' ATTORNEY FEES

Before the Court is the motion of the Plaintiffs for an award of attorney fees incident to the litigation of their contract claim. The parties have submitted Joint Stipulations and a Request for the Court to enter an Order determining Plaintiffs' motion. Plaintiffs' attorney fees are recoverable pursuant to 36 O.S. § 3629(B), and the Judgment entered on November 3, 1995, herein.

Upon review of the parties' pleadings and the Court file as to this matter, and pursuant to the parties' joint stipulations, the Court finds that Plaintiffs are entitled to recover attorney fees in the amount of $21,912.50. Said amount represents a reasonable attorney fee for the litigation of Plaintiff's contract claim through November 14, 1995.

IT IS THEREFORE ORDERED that Plaintiffs shall recover attorney fees of $21,912.50 from the Defendant, for services rendered through November 14, 1995.

S/ THOMAS R. BRETT

THOMAS R. BRETT
DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL INSURANCE COMPANY, Plaintiff, vs. TRI-STATE INSURANCE COMPANY, Defendant.	Case No. 93-C-715-B Consolidated with
CITATION OIL AND GAS CORPORATION, Plaintiff, vs. TRI-STATE INSURANCE COMPANY and HEALDTON TANK TRUCK SERVICE, INC., Defendants.	Case No. 94-C-697-B ENTERED ON DOCKET DATE AUG 19 1996

J U D G M E N T

Pursuant to the Order entered simultaneously herein, and the Findings of Fact and Conclusions of Law entered herein on November 28, 1995, Judgment is herewith entered in favor Plaintiff Federal Insurance Company and against Defendant Tri-State Insurance Company in the amount of Two Million Dollars ($2,000,000) of which the sum of One Million Dollars ($1,000,000) has been deposited into Court by Tri-State Insurance Company on April 16, 1996, and disbursed to Federal Insurance Company on April 19, 1996. Post-judgment interest

in the amount of 5.67% per annum is hereby awarded on the remaining $1,000,000 sum, until paid.

Costs are awarded to Federal Insurance Company if timely applied for pursuant to Local Rule 54.1. Each party is to bear its own attorneys fees.

DATED this 16th day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL INSURANCE COMPANY, Plaintiff, vs. TRI-STATE INSURANCE COMPANY, Defendant.	Case No. 93-C-715-B Consolidated with
CITATION OIL AND GAS CORPORATION, Plaintiff, vs. TRI-STATE INSURANCE COMPANY and HEALDTON TANK TRUCK SERVICE, INC., Defendants.	Case No. 94-C-697-B

ORDER

This matter comes on for consideration of a Joint Motion For Entry Of Judgment And Federal Insurance Company's Motion In Support For Attorneys Fees, Interest, And Costs. (docket # 100) Also under consideration is the parties joint request that the Court's Findings of Fact and Conclusions of Law, entered November 28, 1995, be considered a final Judgment. The Court denies this request as a final Judgment will be entered simultaneously herein with the

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instant Order.[1] Further, the parties jointly request that the Court treat Defendant Tri-State Insurance Company's Motion to Reconsider and the Supplement as post-trial motions, which the Court herewith GRANTS.

THE PRE-JUDGMENT INTEREST ISSUE

Essentially, Federal relies upon two Oklahoma statutory bases, 23 O.S. §22 and 23 O.S. §6, to establish its right to pre-judgment interest. Section 22 provides:

> "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Section 6 provides:

> "Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Federal argues that Oklahoma courts have held that obligations to pay money under an insurance contract fit within Section 22, citing Wilson v. Prudential Insurance Co. of America, 528 P.2d 1135 (Okla.Ct.App.1974) and Poteete v. MFA Mut. Ins. Co., 527 P.2d 18 (Okla.1974). Federal further argues that the critical aspect of Section 22 is whether the amount of money owed under the insurance policy is capable of being ascertained, relying upon Fidelity-Phenix Fire Ins.Co. v. Board of Education, 204 P.2d 982

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[1] In the Court's Findings of Fact and Conclusions of Law, entered November 28, 1995, the Court's Conclusion No. 22 stated: "The Court will defer entry of Judgment herein until the conclusion of the remaining issues. The matters of costs, pre-judgment interest, post-judgment interest and attorneys fees will be addressed at or after the entry of Judgment."

(Okla.1948).

Federal also avers that the amounts under Tri-State's excess policies became payable to Federal when Federal settled the injured's (McElroy's) claim against Citation Oil and Gas Corporation on April 15, 1993 by paying $2,750,000.00. Federal filed this action on August 11, 1993 against Tri-State on two policies for $1,000,000 each.

In its Findings of Fact and Conclusions of Law the Court concluded that Federal is entitled to recover from Tri-State the sum of $2,000,000 under the two policies. Tri-State paid $1,000,000 into this Court on April 16, 1996, and the second $1,000,000 remains unpaid.

Tri-State, in opposition to Federal's quest for pre-judgment interest, argues that 12 O.S. § 727 rather than 23 O.S. §§ 22 and 6 governs the allowance *vel non* of pre-judgment interest. That section contains a formula for determining the rate of interest on judgments, both prejudgment and postjudgment interest.[2]

It appears to the Court that pre-judgment interest is allowable under § 727 in certain instances. § 727 provides in part:

> "2. When a verdict for damages by reason of personal injuries or injury to personal rights including, but not limited to, injury resulting from bodily restraint, personal insult, defamation, invasion of privacy, injury to personal relations, or detriment due to an act or omission of another is accepted by the trial court, the court in rendering judgment shall add interest on said verdict at a rate prescribed pursuant to subsection B of this section from the date the suit was commenced to the date of verdict....."

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[2] The post-judgment interest aspect of §727 would be applicable to state court judgments only. Post-judgment interest in Federal court judgments is governed by 28 U.S.C. § 1961 (1992).

> "3. When a judgment is rendered establishing the existence of a lien against property and no rate of interest exists, the court shall allow prejudgment interest at a rate prescribed pursuant to subsection B of this section from the date the lien is filed to the date of verdict."

Thus, three sections of the Oklahoma statutes arguably permit pre-judgment interest herein, i.e. 12 O.S. § 727, 23 O.S. §§ 22 and 6.

Notwithstanding this, the larger issue seems to the Court to be Tri-State's argument that even if pre-judgment interest is allowable to Federal under the instant facts, the total recovery cannot exceed the policy limits, i.e. one million dollars each. Tri-States cites Torres v. Kansas City Fire & Marine Ins. Co., 849 P.2d 407 (Okla.1993) and Carney v. State Farm Ins. Co., 877 P.2d 1113 (Okla.1994) in support of this position.

Both Torres and Carney recognize that an insurer could be held liable for pre-judgment interest but that the total liability of the insurer does not extend beyond the policy limits. Carney specifically overruled Phillips v. State Farm Mut. Auto. Ins. Co., 848 P.2d 70 (Okla.Ct.App.1993), which had held in 1993 that pre-judgment interest is not subject to the limits of an uninsured motorist policy. Id. at 1119.

Carney recognized that an exception to the pre-judgment interest/policy limit rule may exist under certain conditions, such as bad faith on the part of the insurer, arguably present in the instant matter but not established as a part of the law of this case.

> "[3] Under certain conditions, this Court has imposed liability on insurers in excess of policy limits. In Allstate Ins.Co. v. Amick, 680 P.2d 362 (Okla.1984). the Court cited American Fidelity and Casualty Co. v. L.C. Jones Trucking Co., 321 P.2d 685 (Okla.1958) and

> National Mut. Casualty Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948) wherein the Court recognized the duty to act in good faith toward the insured by accepting reasonable settlements. For the breach of this duty, this court imposed liability in excess of policy limits. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla.1977) cited 36 O.S. 1971, § 4405(A)(8) observed that the Insurance Code required insurance companies to make immediate payment of claims. This statutory duty recognized that a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly, and further observed that "Unwarranted delay precipitates the precise economic hardship the insured sought to avoid by purchase of the policy." Christian, 577 P.2d 903." Id. at 1115

In Carney , the Court concluded there was no evidence of bad faith before the Court to enable it to grant recovery in excess of the policy limits of the insurance contract. In the present matter, the issue of bad faith, having been settled by the parties, was never established as a predicate to exceed the policy limits herein. The issue of bad faith remained after the Court's entry of Findings of Fact and Conclusions of Law on November 28, 1995. However, the parties have resolved this issue by mutual agreement .

THE POST-JUDGMENT INTEREST ISSUE

Post-judgment interest in Federal court judgments is governed by 28 U.S.C. §1961 (1992) and 40 U.S.C. §258. In diversity actions, the rate of interest is calculated according to the federal interest rate on the date of final judgment, which, as of the date of this Order, is 5.67% per annum.

THE ATTORNEYS FEES AND COSTS ISSUES

Federal, citing 12 O.S. §936, seeks attorneys fees in the amount of $40,068.00 as of June 10, 1996. Tri-State has stipulated that this amount is reasonable but disputes Federal's entitlement to attorney fees.

Federal argues the instant matter is a "contract ... relating to services" and therefore subject to an award of attorney fees pursuant to §936, which provides:

> "In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject [of] the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

The Oklahoma Supreme Court has held that "contract relating to ...." does not apply to "labor or services ....". Russell v. Flanagan, 544 P.2d 510 (Okla.1975). The Court concludes Federal has not established its right to recover attorneys fees herein.

CONCLUSION

The Court concludes Federal's recovery under the two policies for one million dollars each cannot exceed the policy limits; that Federal is entitled to post-judgment interest at the presently existing rate from the date of the Judgment, which will be simultaneously entered herein; and that Federal is not entitled to recover attorneys fees from and against Tri-State.

IT IS SO ORDERED this 16th day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NANCY BUTTERS, individually and as parent and next friend of DEREK REUST, a minor,

Plaintiff,

vs.

H.B. MANAGEMENT, INC., an Oklahoma corporation, DAYS INNS of AMERICA, and COMMERCIAL UNION INSURANCE COMPANY, a foreign insurance company,

Defendants,

and

COMMERCIAL UNION INSURANCE COMPANY,

Defendant/Third Party Plaintiff,

vs.

ST. ANTHONY HOSPITAL, OKLAHOMA CITY, OKLAHOMA,

Third Party Defendant.

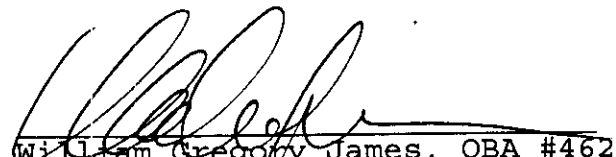
Case No. 95 C 745-C

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

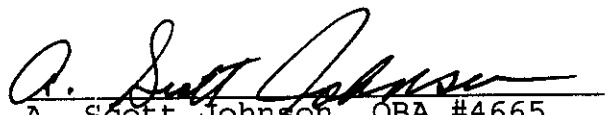
COME NOW Third Party Plaintiff and Third Party Defendant pursuant to Fed. R. Civ. P. 41(a)(1) and hereby stipulate that the third party action is hereby dismissed without prejudice to any future refiling.

Third Party Plaintiff and Third Party Defendant stipulate that each side waives any entitlement to costs or attorney's fees as a condition of dismissal.

The parties further stipulate that if a court later determines that pre-judgment interest is recoverable, such interest shall be tolled or suspended from the date of this dismissal until the date the case is re-filed.



William Gregory James, OBA #4620
900 Oneok Plaza
100 West 5th Street
Tulsa, OK 74103
ATTORNEY FOR THIRD PARTY PLAINTIFF



A. Scott Johnson, OBA #4665
JOHNSON, HANAN and CONNOR, P.C.
Liberty Tower, Suite 2750
100 North Broadway Ave.
Oklahoma City, Oklahoma 73102
ATTORNEY FOR THIRD PARTY DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE HOME-STAKE OIL & GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION,	)	
Plaintiffs,	)	
vs.	)	Case No. 93-C-303-E
HOME-STAKE ACQUISITION CORPORATION, a Delaware corporation, ENVIROMINT HOLDINGS, INC., a Florida corporation f/k/a TRI TEXAS, INC., INTERNATIONAL INSURANCE INDUSTRIES, INC., a Delaware corporation, SUMMIT PARTNERS MANAGEMENT CO., a corporation, CHARLES S. CHRISTOPHER, an individual, MICHAEL J. EDISON, an individual sometimes d/b/a International Insurance Industries, Inc., MADERA PRODUCTION COMPANY, a Texas corporation, AGO COMPANY, a Texas corporation, and AGR CORPORATION, a Texas corporation,	)	
Defendants.	)	

ORDER

On this 15th day of August, 1996 there came on for hearing before this Court at a duly noticed status conference, Plaintiffs' Motion to Dismiss Without Prejudice. After reviewing the Motion and hearing the statements of counsel, this Court finds that the Motion should be granted.

IT IS HEREBY ORDERED that the claims asserted in this action by The Home-Stake Oil and Gas Company and The Home-Stake Royalty Corporation against Charles S. Christopher,

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International Insurance Industries, Inc., and Michael J. Edison are hereby dismissed without prejudice and each party shall bear their own costs and attorneys fees associated with this matter.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ST. PAUL SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

vs.

ROBINOWITZ OIL COMPANY,

Defendant.

No. 95-C-716-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 15 day of August, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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DATE 8-16-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COUNTRY MUTUAL INSURANCE COMPANY,

Plaintiff,

vs.

RICHARD L. BUNDY, SCOTT BARGSTEN, KEVIN MCCANN, MARLAINA MCCANN, and SARAH MCCANN, a minor,

Defendants.

No. 95-C-1123-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 15 day of August, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUHIYR SALEEM,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-806-K

O R D E R

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, this action is hereby remanded to the Secretary for further proceedings.

IT IS SO ORDERED THIS 14 DAY OF AUGUST, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD D. HORNSBY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 95-C-940-B
	)	
EDWARD EVANS,	)	
	)	
Respondent.	)	

JUDGMENT

Pursuant to the order denying Petitioner's application for a writ of habeas corpus, the court hereby enters judgment in favor of Respondent, Edward Evans, and against Petitioner, Harold D. Hornsby.

SO ORDERED THIS 15th day of Aug., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALERIE HECHT,

Plaintiff,

vs.

ENGINEERING DESIGN GROUP, INC.,

Defendant.

Case No. 95 C 1205 E

ORDER OF DISMISSAL WITH PREJUDICE

UPON the Joint Stipulation For Dismissal With Prejudice filed herein by the parties, it is hereby,

ORDERED, that this case is dismissed with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.

DATED: This 14 day of August, 1996.

S/ JAMES O. ELLISON

United States District Judge

Submitted by:

Leslie C. Rinn, OBA # 12160
2121 S. Columbia, Suite 710
Tulsa, OK 74114
(918) 742-4486

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD D. HORNSBY,
Petitioner,

vs.

EDWARD EVANS,
Respondent.

Case No. 95-C-940-B

ORDER

This is a proceeding on an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges three Tulsa County convictions. The Court concludes that Petitioner's application for a writ of habeas corpus and petition for evidentiary hearing should be denied.[1]

[1]On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, H.R.Rep. No. 104-518, 104th Cong., 2d Sess., which provides new standards for analyzing a petition for a writ of habeas corpus. The Court does not believe that the new provisions set out in section 105 apply to petitions, like the one at hand, which were filed before the passage of the Act. Although Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment are to apply to all pending and subsequently filed cases, Congress declined to include such language in section 105, and therefore the Court infers that retroactivity was not intended. In any event, the Court concludes that section 105 narrows the standard of review in habeas cases and therefore should not be applied retroactively. Landgraf v. USI Film Prods., 511 U.S. 244 (1994). Therefore, the 1996 amendments to section 2254 do not apply to the instant case.

I. BACKGROUND

On October 19, 1990, Petitioner pled guilty to Larceny from Person (CRF-90-3198) and Larceny of Merchandise (CRF-90-461). He received sentences of three years, suspended, and one year, deferred, respectively. Petitioner did not seek a direct appeal, but later filed an application for post-conviction relief, seeking an appeal out of time on the ground of ineffective assistance of counsel. The Tulsa County District Court denied relief on state procedural grounds and the Court of Criminal Appeals affirmed. (Doc. #6 ex. B.)

On January 21, 1993 Petitioner was found guilty of Robbery by Fear and Robbery by Firearms (CRF-92-170) in a trial by jury. The trial judge sentenced Petitioner in accordance with the jury verdict to fifteen and twenty-five years respectively, and imposed a $5,000 fine. Petitioner appealed his conviction solely on the grounds of the improper fine. The Court of Criminal Appeals initially affirmed the fine on March 30, 1995, but later vacated it on a petition for rehearing.

During the trial, Petitioner filed a Writ of Mandamus based on a Motion to Quash and a "Writ of Conspiracy" filed in the district court. He also filed a Writ of Prohibition alleging lack of jurisdiction by the trial court. The Court of Criminal Appeals denied both writs.

Petitioner then filed a petition for post-conviction relief challenging his 1993 conviction. The state district court denied relief on state procedural grounds and the Court of Criminal

Appeals affirmed. The Court of Criminal Appeals also denied a Writ of Habeas Corpus and Motion for Rehearing.

On September 18, 1995, Petitioner filed the instant petition for a Writ of Habeas Corpus, challenging both of his 1990 convictions.[2] On October 18, 1995, Petitioner filed an amended petition for a writ of habeas corpus challenging both his 1990 and 1992 convictions. In the latter petition, Petitioner alleges official interference by the state courts in dismissing his direct appeal and requests for post-conviction relief. Additionally, Petitioner complains of inadequacy of counsel, lack of jurisdiction of the district and appellate courts, and inadequate production of evidence during these convictions.

II. ANALYSIS

The Court has liberally construed Petitioner's pleadings and claims in accordance with his pro se status.

A. Case No. CRF-90-461

Respondent contends this Court should not entertain Petitioner's request for habeas relief as to his conviction in Case No. CRF-90-461 because Petitioner is no longer in custody pursuant to that conviction. Petitioner admits at page two of his original

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[2]Specifically, Petitioner alleged failure to hold a preliminary hearing, guilty plea was not knowing and voluntary, and the prosecutor committed perjury. Petitioner also claimed the trial court abused its discretion in failing to appoint counsel to litigate a motion to withdraw guilty plea. Finally, Petitioner alleged the inadequacy of the record requires an evidentiary hearing in this habeas corpus proceeding.

petition that he is serving a sentence other than the one under attack and states no reasons in his original/amended petition or reply brief that he is still in custody pursuant to the judgment in Case No. CRF-90-461. Accordingly, the Court concludes that Petitioner was not "in custody in violation of the Constitution or law or treaties of the United States" when he filed the instant petition for a writ of habeas corpus. See 28 U.S.C. § 2241(c)(3); Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (a petitioner must be in custody under the conviction or sentence under attack at the time his petition is filed).

Therefore, Petitioner's request for habeas relief as to Case No. CRF-90-461 is hereby denied.

B. Case No. CRF-90-3198

Next Petitioner alleges that his conviction in Case No. CRF-90-3198 is void because the trial court failed to hold a preliminary hearing and failed to direct that the plea and sentencing hearing be transcribed. Respondent contends these claims are procedurally barred as they could have been raised on direct appeal. Petitioner responds that counsel's failure to file a motion to withdraw his guilty plea and then pursue a direct appeal amounts to ineffective assistance of appellate counsel.[3]

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[3]Petitioner further alleges that his conviction in Case No. CRF-90-3198 is void because the prosecutor perjured himself at the plea hearing and because the trial court abused its discretion in failing to appoint counsel to litigate a motion to withdraw guilty plea. The Court finds these grounds patently frivolous. Whether the prosecutor perjured himself does not raise a constitutional claim. Moreover, Petitioner at no time

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722 (1991); see also Gilbert v. Scott, 941 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded...efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McClesky v. Zant, 499 U.S. 467, 494 (1991).

To prove ineffective assistance of counsel for failing to preserve the right to a direct appeal, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal

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filed a motion to withdraw guilty plea.

that petitioner would have had a reasonable probability of obtaining relief. Lockart v. Fretwell, 506 U.S. 364 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984).

Petitioner's retained counsel had no absolute duty to file a motion to withdraw the guilty plea or advise Petitioner whether he had meritorious grounds for appeal. Hardiman v. Reynolds 971 F.2d 500, 507 (10th Cir. 1992). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989); see also Briggs v. Carr, No. 94-5161, 1995 WL 250796, *4 (10th Cir. May 1, 1995)(unpublished opinion).

Petitioner has not alleged a constitutional claim of error which could result in setting aside his guilty plea. The only constitutional claim asserted by Petitioner is that his retained counsel provided ineffective assistance of counsel. Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Petitioner's counsel had no duty to advise Petitioner of his right to appeal the guilty plea absent any evidence demonstrating that counsel knew or should have known

Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188. Therefore, the Court finds Petitioner's counsel did not provide constitutionally ineffective assistance in failing to file a motion to withdraw guilty plea and seek an appeal.

As Petitioner cannot show cause and prejudice for his procedural default, Petitioner's claims as to Case No. CRF-90-3198 are hereby denied as procedurally barred.

C. Case No. CRF-92-170

As to his conviction in Case No. CRF-92-170, Petitioner challenges (1) the sufficiency of unverified information, (2) the adequacy of the jury instructions on the burden of proof, (3) the enhancement of his sentence; and (4) the assistance of his trial counsel. Respondent contends Petitioner failed to raise the above claims on direct appeal and, therefore, he is procedurally barred from raising them in the instant petition. Petitioner asserts the claims were not brought during his direct appeal because his appellate counsel was constitutionally ineffective due to a conflict of interest.[4]

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[4]Petitioner further challenges the jurisdiction of the trial and appellate courts. He contends the trial court tried and sentenced him while his request for a writ of mandamus was pending before the Court of Criminal Appeals. Likewise he contends that the Court of Criminal Appeals affirmed his conviction while "jurisdiction had been transferred to the Supreme Court of Okla[homa]." (Amended Petition, Doc. #4, at 7.) The Court declines to address the above issues as they do not present federal constitutional claims.

To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different. Id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 508 U.S. 912 (1993).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner must establish that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987)(ineffective assistance of counsel when appellate counsel ignores "a substantial, meritorious Fifth Amendment issue" raising

instead a weak issue"); Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices. See Lockhart v. Fretwell, 506 U.S. 364 (1993).

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Lockart v. Fretwell, 506 U.S. 364 (1984). To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

In the instant case, counsel's failure to raise on appeal claims regarding the unverified information and jury instructions

does not fall below the standard of reasonably effective assistance. Petitioner cannot show that the issues not pursued by his counsel are clearly stronger than the claim challenging the imposition of the $5,000 fine. Thus, Petitioner does not satisfy the first prong of the Strickland test.

The court notes that Petitioner's claim as to the adequacy of the jury instruction is unsupported by any evidence. The Honorable Jay D. Dalton, and not the Honorable Clifford Hopper, presided at Petitioner's trial. Petitioner fails to show Judge Dalton issued the "presumed not guilty" jury instruction overturned in Flores v. State,896 P.2d 558 (Okla. Crim. App. Jan. 24, 1995)(holding jury instruction issued by Judge Hopper that plaintiff is "presumed not guilty" as opposed to "presumed innocent" was invalid). Accordingly, the Court has no basis to grant relief for Petitioner's claim of inadequate jury instruction.

Petitioner asserts ineffective assistance of counsel by reason of conflict of interest. Petitioner's incessant demands and criticism of his own counsel lead said counsel to seek refuge by claiming a conflict of interest in the hopes of relief from further obligation to Petitioner. Petitioner claims counsel failed to forward various legal arguments on his behalf. "The mere fact that counsel fails to recognize the factual or legal basis for a claim, or fails to raise the claim despite recognizing it, is not sufficient to preclude enforcement of a procedural default." Webb v. State, 835 P.2d 115, 116 (Okl. Cr. 1992)(citing Murray v. Carrier, 477 U.S. 478 (1986)). Petitioner has demonstrated a

pattern of displeasure, regardless of who is representing him. Petitioner was represented by three attorneys who withdrew from Petitioner's cases due to conflict of interest. This conflict of interest arises out of Petitioner's own indignation, rather than inadequacy of counsel.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 506 U.S. 390 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in Case No. CRF-92-170.

Therefore, Petitioner's claims as to Case No. CRF-92-170 are hereby denied as procedurally barred.

D. Evidentiary Hearing

Lastly, Petitioner alleges that the Court cannot effectively rule on the adequacy of counsel without conducting its own evidentiary hearing. Additionally, Petitioner asserts that an evidentiary hearing is mandated by Respondents' failure to respond "on the merits" or to produce trial transcripts. This Court disagrees. As noted above, any determination by this Court is limited to whether appellate counsel was ineffective in the constitutional sense by failing to include various issues on direct appeal in Case No. CRF-92-170.[5] In Case No. CRF-90-9138 the Court

[5]Based upon transcripts and correspondence between Petitioner and counsel, trial counsel submitted some of Petitioner's claims and dismissed others as frivolous. Appellate

is limited to determining whether counsel failed to advise Petitioner of his rights to withdraw his guilty plea and file a direct appeal.[6]

Therefore, the Court concludes that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

III. CONCLUSION

The Court concludes habeas relief in Case No. CRF-90-461 is unavailable because Petitioner is no longer in custody pursuant to that conviction. Habeas relief in Case Nos. CRF-90-3198 and CRF-92-170 is procedurally barred.

Accordingly, Petitioner's motions for issuance of writ of habeas corpus and to conduct evidentiary hearing (Docket #13) and for leave to supplement reply (Docket #17) are DENIED.

Petitioner's supplemental claim of denial of access to the Court filed July 23, 1996 is not properly before the Court and thus will not be considered. The Clerk shall MAIL to Petitioner a copy of his supplemental reply brief.

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counsel did not consider any of Petitioner's claims worthy of appeal.

[6]The Court has been provided with sufficient court transcripts to evaluate the sufficiency of these claims.

IT IS SO ORDERED this 9th day of Aug, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL A. McREYNOLDS,

Plaintiff,

vs.

LEDAR TRANSPORT and
JOSEPH M. BERMAN,

Defendants.

Case No. 96-C-514-B

ORDER

This matter comes on for consideration of Plaintiff Samuel A. McReynolds' Motion To Remand this matter to the District Court of Creek County, Bristow Division, State of Oklahoma. (docket # 3)

Defendant Ledar Transport removed this matter from state court on June 6, 1996. 28 U.S.C. §1446(b) requires that removal of a state court action be within thirty days of the receipt of the initial pleading on the Defendant. Defendant Ledar Transport's "Notice of Removal" states that it was served with process on May 6, 1996. The file stamped date on the "Notice of Removal" shows filing on June 6, 1996, a Thursday which was not a holiday. Thus the removal is one day late.

Ledar Transport responds that, in such a situation, remand is only required if the federal court lacks subject matter jurisdiction, citing Glover v. W.R. Grace & Co., Inc., 773 F.Supp. 964 (E.D.Tex. 1991) and 28 U.S.C. §1447(c). Ledar Transport argues that the thirty day time limit for removal is a formal requirement that may be waived since it is not a jurisdictional barrier, citing

Powers v. Chesapeake & O.Ry., 169 U.S. 92 (1898), London v. United States Fire Ins. Co., 531 F.2d 257 (5th Cir.1976), and Glover, supra.

Plaintiff's rejoinder to Ledar Transport's response is that the thirty day time requirement of 28 U.S.C. 1446(c) is mandatory and can only be waived by failure to timely file a Motion To Remand, citing Fristoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir.1980) and McLeod v. Cities Service Gas Co., 233 F.2d 242 (10th Cir. 1956).

Plaintiff also urges that Ledar Transport's removal is defective because a co-defendant, Joseph M. Berman, did not join in the removal and that Berman's belated joinder (July 11, 1996) in the Notice of Removal is ill-served.

Under the facts herein, and the authorities cited, the Court concludes Plaintiff's Motion To Remand should be and the same is hereby GRANTED. This matter is remanded to the District Court for Creek County, State of Oklahoma.

IT IS SO ORDERED this 14th day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE BANK & TRUST, N.A., a national banking association,	)	
Plaintiff,	)	
vs.	)	Case No. 96-C-414B
JOHN CHRIST; CREW RESOURCES, a trust; DENNIS DAZEY, individually and as trustee of CREW RESOURCES, a trust; MARCUS CRAIG OSWALT; and JIM LAMBERT,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AGAINST DEFENDANT CREW RESOURCES

CAME ON before the Court the Motion for Award of Attorneys' Fees Against Defendant Crew Resources (the "Motion") filed by the Plaintiff STATE BANK & TRUST, N.A. ("State Bank"). Good cause appearing,

IT IS ORDERED that State Bank is awarded its reasonable attorneys' fees in the amount of $11,026.00 against Defendant Crew Resources.

Dated: August 14, 1996.

S/ THOMAS R. BRETT
U.S. District Judge

Submitted by:

ANDREW R. TURNER, OBA #9125
of
CONNER & WINTERS
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15 East Fifth Street
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(918) 586-5711
Attorneys for Plaintiff
STATE BANK & TRUST, N.A.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS W. RODGERS,

Plaintiff,

vs.

HAROLD BERRY, and CHARLIE RICE,

Defendants.

No. 96-CV-598-B

ORDER

On July 24, 1996, the Court entered an order notifying Plaintiff that this action would be dismissed for failure to state a claim unless Plaintiff filed an amended complaint, asserting claims cognizable under 42 U.S.C. § 1983. Plaintiff has neither responded nor notified the Court of his new address.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's complaint is DISMISSED for failure to state a claim upon which relief can be granted. 28 U.S.C. § 1915(e)(2)(B) as amended by The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996).

IT IS SO ORDERED this 14th day of Aug., 1996.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOYD ROSENE AND ASSOCIATES, INC.,

Plaintiff,

vs.

KANSAS MUNICIPAL GAS AGENCY, an interlocal municipal agency, and CITY OF WINFIELD, KANSAS, a municipality,

Defendants.

Case No. 95-C-674-B

JUDGMENT

In keeping with the Court's Order filed August 14, 1996, Judgment is hereby entered in favor of Defendant Kansas Municipal Gas Agency and against Plaintiff Boyd Rosene & Associates. Further, Judgment is hereby entered in favor of Defendant City of Winfield, Kansas and against Plaintiff Boyd Rosene & Associates.

Each party shall pay their respective attorney's fees.

Costs of this action are hereby awarded in favor of Kansas Municipal Gas Agency and City of Winfield, Kansas and against Boyd Rosene & Associates, upon proper application pursuant to Local Rule 54.1.

IT IS SO ORDERED this 14th day of August, 1996.

THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOYD ROSENE AND ASSOCIATES, INC.,

Plaintiff,

vs.

KANSAS MUNICIPAL GAS AGENCY, an interlocal municipal agency, and CITY OF WINFIELD, KANSAS, a municipality,

Defendants.

Case No. 95-C-674-B

ORDER

The Court has for consideration Plaintiff Boyd Rosene's ("Boyd Rosene") motion for partial summary judgment (Docket # 24), Defendant City of Winfield, Kansas' ("Winfield") motion to dismiss for lack of *in personam* jurisdiction and improper venue, and in the alternative, for summary judgment (Docket # 44), and Defendant Kansas Municipal Gas Agency's ("KMGA") motion for summary judgment (Docket # 64) pursuant to Fed.R.Civ.P. 56. The Court, being fully apprised of the matter via the various briefs, exhibits, affidavits, supplements, and hearing transcripts hereby DENIES Winfield's motion to dismiss. The Court further GRANTS Winfield and KMGA's motions for summary judgment. Boyd Rosene's motion for partial summary judgment is DENIED.

I. Statement of the Case

KMGA is an interlocal municipal agency created to secure natural gas supplies for its member cities. In 1992, the City of Winfield, Kansas contracted with KMGA agreeing, *inter alia*, to purchase at least seventy five percent (75%) of its annual natural gas consumption from KMGA for the term of the KMGA/Winfield Agreement ("City Agreement"). The City Agreement was in effect through April 30, 1995. From May 1, 1994 through April 30, 1995, Winfield did not purchase seventy five percent (75%) of its natural gas consumption from KMGA. KMGA invoiced Winfield the appropriate amount for said breach under the terms of the City Agreement. Winfield paid the invoice equaling roughly $34, 000, exclusive of credits Winfield had with KMGA.

In April 1994, KMGA entered into a written negotiated one year purchase and sell agreement with Boyd Rosene, a Tulsa-based natural gas supplier. The term of the Boyd Rosene/KMGA Agreement was May 1, 1994 through April 30, 1995. A provision of the Boyd Rosene/KMGA Agreement set forth a range of volumes of natural gas KMGA was allowed to purchase from Boyd Rosene. KMGA purchased at least the minimum volumes of natural gas as set forth in the Boyd Rosene/KMGA Agreement.

To secure its obligations under the Boyd Rosene/KMGA Agreement, Boyd Rosene purchased one hundred and eleven (111) natural gas futures contracts. Subsequently, the price of natural gas declined sharply. During the Boyd Rosene/KMGA Agreement period, KMGA did not purchase as much gas as Boyd Rosene secured through the gas futures contracts. Boyd Rosene incurred substantial losses upon exiting the excess natural gas futures contracts. Boyd Rosene brought the instant action seeking to recover some of its losses, asserting that KMGA and/or Winfield's breach of the Boyd Rosene/KMGA Agreement caused such loss.

II. Uncontroverted Facts

1. Boyd Rosene and Associates, Inc., is an Oklahoma corporation with its principal place of business in the State of Oklahoma, and is an Oklahoma citizen for purposes of diversity jurisdiction. (Kent Dunbar Affidavit, Pl. App. Doc. #1).

2. Defendant KMGA is an agency created by certain Kansas municipalities and organized under the Kansas Interlocal Cooperation Act with its principal place of business in the State of Kansas. (Para. 4, Answer of KMGA to Second Amended Complaint).

3. KMGA was formed by a group of municipalities to obtain a reliable, competitively-priced, long-term source of natural gas and to provide suppliers to meet the long-term gas needs of its members. (Para. 5, Answer of KMGA to Second Amended Complaint).

4. The Defendant City of Winfield, Kansas is a Kansas municipality and an associate member of the KMGA. (Para. 6, Answer of KMGA to Second Amended Complaint).

5. In April 1992, KMGA and Winfield entered into a written contract titled "Gas Acquisition Management Project Participation Agreement" ("City Agreement"). The City Agreement provided, *inter alia*,:

a. KMGA agreed to act on behalf of the project participants to acquire natural gas, arrange for transportation and delivery, and provide other management services.

b. Winfield agreed it would purchase from KMGA at least 75% of its gas requirements.

c. Winfield would pay KMGA certain project management fees. (Pl. Ex. 1, P 2052-2065; App. Doc. #5).

6. The City Agreement was in place between May 1, 1994 and April 30, 1995. (Gas

Participation Management Project Participation Agreement, Pl. App. Doc. # 5).

7. On March 4, 1994 KMGA sent a Request for Proposal ("RFP") to Boyd Rosene. The RFP stated KMGA sought suppliers to commit supplies at competitive prices to serve the gas requirements of its members. (Pl. Ex. 2, pgs. 16-17, Pl. App. Doc. # 2).

8. The RFP also included a Nomination Schedule setting forth a monthly estimate of the total and peak gas requirements of KMGA. (Pl. Ex. 2, pgs. 16-17, Pl. App. Doc #2).

9. On April 12, 1994 Boyd Rosene submitted a bid to KMGA to supply gas to KMGA. (Rosene Affidavit, Pl. App. Doc. #1).

10. On or about April 12, 1994 Deborah Roberson, Director of the Gas Project, contacted a representative of Winfield and inquired if Winfield would accept Boyd Rosene as a gas supplier. Subsequently, Winfield notified KMGA that it preferred Arkla, even though Arkla gas was more expensive than that offered by Boyd Rosene. (Pl. App. Doc. #9).

11. On April 14, 1994 Boyd Rosene sent a Letter of Intent to KMGA. KMGA signed the Letter of Intent on April 26, 1994. (Pl. App. Doc. #8).

12. On May 1, 1994 KMGA and Boyd Rosene entered into a Gas Acquisition Management Project Purchase Agreement ("Boyd Rosene/KMGA Agreement") by which KMGA agreed to "purchase and receive monthly, the monthly total of the daily quantities nominated, agreed to, and described in Exhibit A," and Boyd Rosene agreed to "sell and deliver quantities nominated by KMGA." (Para. 13, Answer of KMGA to Second Amended Complaint).

13. Article II of the Boyd Rosene/KMGA Agreement governs the quantity of gas to be sold and delivered. (Pl. App. Doc. # 10).

14. KMGA purchased from Boyd Rosene at least the minimum volumes of gas for each

month as set out on Exhibit A to the Boyd Rosene/KMGA Agreement. (Pl.'s Responses to KMGA's Request for Admission Nos. 4 and 5, Exhibit D, KMGA brief in support).

15. The Boyd Rosene/KMGA Agreement contains an integration clause, which provides as follows:

> 14.6 INTEGRATION: This Agreement contains the entire Agreement between the parties hereto, and no waiver, modification or other changes shall be effective unless in writing and executed by the parties.

16. The Boyd Rosene/KMGA Agreement represents the complete agreement and understanding of the parties, and no written waivers, modifications or other changes to the Boyd Rosene/KMGA Agreement have been entered into by the parties. (Deposition of Warren Kent Dunbar at pgs. 67-68, Exhibit F, KMGA brief in support).

17. The Boyd Rosene/KMGA Agreement provides it will be governed and construed in accordance with the laws of Kansas. (Boyd Rosene/KMGA Agreement ¶ 14.5).

18. Between May 1, 1994 and April, 30, 1995, Winfield consumed 1,700,084 MMBtu's of natural gas. (Roberson Transcript, P. 82 L. 4 through P. 83 L. 3).

19. Pursuant to the City Agreement, Winfield was obligated to purchase from KMGA at least seventy-five percent (75%) of the natural gas it consumed between May 1, 1994 and April 30, 1995. Thus, Winfield was obligated to purchase at least 1,275,063 MMBtu's of natural gas from KMGA for this period. (City Agreement, pg. 3-4).

20. Between May 1, 1994 and April 30, 1995, Winfield purchased 779,946 MMBtu's of natural gas from KMGA, resulting in an underpurchase of 495,117 MMBtu's of natural gas. (Invoice, Pl. App. Doc. #13).

21. A term of the City Agreement provided Winfield would pay KMGA $0.07 for each

MMBtu of natural gas KMGA sold to Winfield. Upon learning of the deficiency, KMGA invoiced Winfield $34,658.19 (495,117 x $0.07) which Winfield paid. (Invoice, Pl. App. Doc. #13).

III. Procedural History

Boyd Rosene filed the instant action seeking over $260,000.00 in damages from KMGA on claims of breach of contract and negligent misrepresentation. Within three (3) days, Boyd Rosene filed an amended complaint, dropping the claim of negligent misrepresentation. KMGA filed a motion to dismiss for lack of *in personam* jurisdiction and improper venue, or in the alternative to transfer the case. The motion was denied by the Court on November 29, 1995. Two (2) days later Boyd Rosene filed a second amended complaint adding Winfield as a party. Boyd Rosene also added claims of negligent misrepresentation, deceit and tortious interference with contract.

On April 8, 1996, Boyd Rosene's motion for partial summary judgment and Winfield's motion to dismiss for lack of *in personam* jurisdiction and improper venue, or in the alternative for summary judgment came at issue. The Court entered an Order granting Winfield's motion to dismiss on May 6, 1996. Boyd Rosene filed a motion for new trial on Winfield's dismissal which this Court granted on June 21, 1996. The Court granted Winfield and Boyd Rosene leave to supplement the pending motions on file. On June 10, 1996, KMGA moved for summary judgment. The motion came at issue on July 5, 1996.

On July 26, 1996, the Court held a pretrial conference which was attended by counsel for Boyd Rosene, KMGA and Winfield. Counsel for Boyd Rosene and KMGA both agreed the Boyd Rosene/KMGA Agreement was unambiguous. Further, said counsel framed the critical issues for this

Court.[1]

IV. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

1

> Mr. Singletary: Your Honor,.....[i]t seems to us the critical issue in this case is, under the contract, what is the defendant -- or the defendants if the plaintiff's agency theory is correct -- obligated to take? If you determine that we're right and the contract obligates us to take the minimum, I don't think there is any dispute we've done that. I think plaintiffs will agree we did. On the other hand, if you determine that the contract obligates us to take more than the minimum, up to what is set out on the contract as the maximum or even above that, the requirements of the City of Winfield, likewise I don't think there is any dispute we have not done that. So I think in part the Court's determination of what the contract requires to be taken in terms of volume is going to be dispositive of a lot of the fact issues.
>
> The Court: The statement of Mr. Singletary here, do all parties agree basically with what he said?
>
> Mr. Davis: Primarily, Judge. Mike Davis on behalf of the plaintiff. We do have pending motions for summary judgment in the case relating to the contract interpretation issue. I think if the Court determines that the contract is unambiguous and requires them to take only the minimums, as is their position, then there is no dispute that they have taken those minimums. If the Court determines that the contract is unambiguous and requires them to take the requirements, which is our position, then I don't think there is any dispute that they have not taken the requirements.

Pretrial Conference Transcript, pg. 2, line 23 through pg. 3, line 24.

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

V. Legal Analysis

A. The Critical Issues

As framed by counsel for Boyd Rosene and KMGA during the pretrial conference of July 26, 1996, the critical issues in the instant case are:

1. Is the Boyd Rosene/KMGA Agreement unambiguous?

2. What amount of gas is KMGA required to take under the terms of the Agreement?

In resolving the critical issues, the Court FINDS:

1. The Boyd Rosene/KMGA Agreement is unambiguous.

2. The Boyd Rosene/KMGA Agreement requires KMGA to take an amount of natural gas equal to the Estimated Minimum Day Requirement as set forth in Exhibit A, Arkla (Case 2), to the Boyd Rosene/KMGA Agreement.

B. Winfield's Motion to Dismiss

For purposes of this motion only, the Court recognizes a fact issue exists whether KMGA is the agent of Winfield. However, the existence of an agency relationship between KMGA and Winfield would not give Boyd Rosene rights under the City Agreement. Under the City Agreement, privity of contract does not exist between Boyd Rosene and Winfield. Therefore, Boyd Rosene enjoys no rights under the City Agreement. Nevertheless, the Court DENIES Winfield's motion to dismiss for lack of *in personam* jurisdiction. Further, the Court FINDS venue to be proper in the Northern District of Oklahoma.

C. The Boyd Rosene/KMGA Agreement

In its first claim for relief, Boyd Rosene asserts KMGA and/or Winfield breached the Boyd Rosene/KMGA Agreement. The first critical issue is whether the Boyd Rosene/KMGA Agreement is ambiguous. Pursuant to ¶ 14.5 of the Boyd Rosene/KMGA Agreement, the signatories chose Kansas law to control its construction. Under Kansas law, whether an ambiguity exists is a question of law for the Court. Kennedy & Mitchell, Inc. v. Anadarko Prod. Co., 754 P.2d 803, 805 (Kan. 1988). Language in a contract is ambiguous only when words used to express the meaning and intention of the parties are insufficient in that the contract may be understood to reach two or more possible meanings. Kennedy, 754 P.2d at 806. If the language of a written instrument is clear and can be carried out as written, there is no room for the rules of construction. Gore v. Beren, 867 P.2d 330 (Kan. 1994) (*quoting* Simon v. National Farmers Org., Inc., 829 P.2d 884 (Kan. 1992)).

The Boyd Rosene/KMGA Agreement is an integrated contract. Undisputed fact # 15; Depo. of W.K. Dunbar, pg. 67 line 14 through pg. 68 line 5. Boyd Rosene contends the Boyd Rosene/KMGA Agreement obligated KMGA to buy the natural gas requirements of Winfield from April, 1994 through May, 1995. The Court disagrees. The City Agreement, executed in 1992, does obligate Winfield to purchase at least seventy five percent (75%) of its natural gas needs from KMGA. Winfield did not meet this obligation during the effective period of the Boyd Rosene/KMGA Agreement. However, nothing in the Boyd Rosene/KMGA Agreement gives Boyd Rosene any rights under the City Agreement. It is disingenuous for Boyd Rosene to suggest otherwise.

Article II of the Boyd Rosene/KMGA Agreement governs the volumes of gas to be sold and delivered. Exhibit A, Arkla (Case 2) to the Gas Acquisition Management Project Purchase Agreement between Boyd Rosene and KMGA specifically enumerates the volumes of gas KMGA

is required to purchase under the terms of said Agreement. It is undisputed KMGA complied with these volume schedules. The City Agreement does not impose any natural gas purchase obligations on KMGA or Winfield with respect to the Boyd Rosene/KMGA Agreement.

Boyd Rosene agrees the contract is unambiguous, yet crafts much of its argument around the parol evidence rule. When a contract is complete, unambiguous and free from uncertainty, parol evidence of prior or contemporaneous agreements or understandings, tending to vary or substitute a new and different contract for the one evidenced by the writing is inadmissible. Williams v. Safeway Stores, Inc., 424 P.2d 541 (Kan. 1967). During the pre-contractual negotiations, Boyd Rosene claims it was led to believe KMGA would purchase the gas requirements of Winfield. The Court is convinced otherwise, as evidenced by the following excerpt:

> Q. (By Mr. Singletary, counsel for KMGA) If the intention here was that all the requirements of the City of Winfield be covered by this gas supply contract between Boyd Rosene and KMGA, why didn't you just write that into the contract, those words, "It is understood and agreed by the parties that this contract is intended and does cover all requirements of the City of Winfield"? (sic).
>
> A. (W.K. Dunbar, Director of Gas Marketing, Boyd Rosene) It was thought that at the -- the process that would need to be gone through to -- this is in our phone conversation that we had with Debbie Roberson and Ann Fox -- that to get any kind of changes, whether they be substantive like this or any other types of changes done in the time frame we were looking at with municipalities involved and the Agency, that it would be impossible to do the transaction.
>
> ***
>
> Q. That it would be impossible to have these changes made in the contract, but --
>
> A. That any changes would be -- to play with any of that language, the parties involved, would take an inordinate amount of time and we wouldn't be able to do the transaction. Both parties were driven to try to do the transaction, consummate the transaction.

Deposition of W.K. Dunbar, pg. 65 line 21 through pg. 66 line 20.

Despite the knowledge the Boyd Rosene/KMGA Agreement did not impose an obligation on Winfield to purchase its requirements from Boyd Rosene, W.K. Dunbar, on behalf of Boyd Rosene, voluntarily executed the Boyd Rosene/KMGA Agreement.

The Court FINDS no genuine issue of material fact in dispute as to the claim of breach of contract. The Court GRANTS KMGA and Winfield's motions for summary judgment on the claim of breach of contract. The Court DENIES Boyd Rosene's motion for partial summary judgment on the claim of breach of contract.

D. Negligent Misrepresentation, Deceit and Tortious Interference with Contract

The Court will forego any recitation of Kansas law concerning the three tort-based claims of Boyd Rosene based on the following rationale. Assuming, *arguendo*, Boyd Rosene could prove the requisite elements of any or all of its tort claims, any damages Boyd Rosene would be entitled to recover are specifically detailed in ¶ 2.7 of the Boyd Rosene/KMGA Agreement. ¶ 2.7(d) makes the agreed damage calculation applicable to tort claims. Under ¶ 2.7, the sole remedy of Boyd Rosene in the event of a breach is an amount equal to the volume of the Deficiency Gas multiplied by the difference in the contract price and the sale price of the Deficiency Gas. Deficiency Gas is defined as the difference between the minimum volumes set out on Exhibit A of the Boyd Rosene/KMGA Agreement and the lesser amount of gas actually taken by KMGA. It is undisputed there is no Deficiency Gas. Thus, there can be no damages.[2]

The Court hereby GRANTS KMGA and Winfield's motions for summary judgment on the claims of negligent misrepresentation, deceit and tortious interference with contract.

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[2]The damage limitation clause of the Boyd Rosene/KMGA Agreement is further corroboration of the parties intent regarding the minimum gas purchase.

Conclusion

For the above reasons, the Court hereby DENIES Winfield's motion to dismiss for lack of *in personam* jurisdiction.

The Court GRANTS KMGA and Winfield's motions for summary judgment on all claims.

Further, the Court DENIES Boyd Rosene's motion for partial summary judgment on all claims.

Each party shall pay their respective attorney's fees.

Costs of this action are hereby awarded in favor of KMGA and Winfield and against Boyd Rosene, upon proper application pursuant to Local Rule 54.1.

IT IS SO ORDERED this 14th day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY J. GILES,
SS# 447-54-2802
Plaintiff,

v.

SHIRLEY S. CHATER,[1] Commissioner
Social Security Administration,
Defendant.

NO. 95-C-340-M

ORDER

Plaintiff, Bobby J. Giles, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U.S.C. §405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th

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[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2] Plaintiff's March 5, 1993 application for disability benefits was denied July 8, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 23, 1994. By decision dated September 30, 1994 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 9, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

Plaintiff has not worked since June 10, 1992 when he was involved in a work-related motor vehicle accident. He claims to be disabled due to headaches and pain in his lower back, neck, shoulder and right arm which resulted from the accident. The ALJ determined that despite these impairments, Plaintiff retains the residual functional capacity ("RFC") to perform his past relevant work as a mail clerk as that position is normally performed in the national economy. The ALJ concluded that Plaintiff is not disabled, nor entitled to a period of disability.

Plaintiff alleges that the ALJ's determination is not supported by substantial evidence. The Court agrees. For the following reasons the Court reverses and remands the case for further proceedings.

Plaintiff suffered an automobile accident on June 10, 1992. The record is unequivocal that following the accident until the latest medical records in the file (October 5, 1994) Plaintiff continuously sought medical care for pain in his back, shoulder, right arm, and neck. The most significant events in Plaintiff's medical course are:

6/10/92	automobile accident;
10/2/92	lumbar laminectomy surgery [R. 113];
5/26/93	rotator cuff repair surgery [R. 134];
9/23/93	arthoscopic surgery of right shoulder, acromioplasty, release of coracoacromial ligament, and debridement of superior surface rotator cuff fraying [R. 152];
1/18/94	disk excision and cervical fusion surgery [R. 18];
10/5/94	discussion with physician of possibility of additional back surgery to remove internal fixation devices. (Rogozinski pedical screws and rods placed in 10/92 laminectomy surgery) [R. 11].

Over a period of 19 months beginning with the date of his accident, Plaintiff underwent four surgeries, including two back surgeries. Throughout this time his physicians continually note Plaintiff's complaints of pain and limitations on his activities. On one occasion Plaintiff returned to the physician in advance of his

scheduled appointment because of pain. [R. 165, 167]. He reported being barely able to walk after shopping at Skaggs and having difficulty getting out of a car. [R. 167, 192]. On practically every page of the record Plaintiff's physicians document muscle spasms, tenderness, decreased range of motion and radiating pain, despite the numerous surgical interventions. [R. 8, 9, 11, 158, 161, 166-67]. The ALJ's determination that "there is now no medically determinable impairment which could cause the claimant's complaints of intractable pain" [R. 35] is not supported by the record.

The ALJ concluded that Plaintiff failed to meet Listing 1.05C which deals with disorders of the spine. However, aside from noting that "two physicians authorized by the Secretary to determine whether the claimant's condition meets. . . the listings determined that it did not" [R. 31], the decision contains little discussion of the evidence in the context of the appropriate listing as required by *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir, 1996). Listing 1.05C requires the following for a presumptive finding of disability:

> C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
>
> 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
>
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

On July 8, 1992 Dr. Robertson diagnosed Plaintiff as having "post-traumatic lumbar radiculopathy, possible herniated disc." [R. 182]. Plaintiff's pre and post operative diagnosis for his October 1992 surgery were "Herniated nucleus pulposus, L4-5 level with radiculopathy." [R. 115, 168]. Seventeen days following surgery Dr. Robertson documents "reduction of sensation about the lateral aspect of lower leg and right foot as he had prior to surgery." [R. 168]. He also notes his leg gives way when testing muscle strength. Similar findings are repeated in November 1992, February 1993, June 1993, August 1993, January 1994, June 1994, August 1994, and October, 1994. [R. 8, 9, 11, 158, 161, 166-67].

Beginning in March 1993, while Plaintiff was engaged in rehabilitation therapy he began experiencing increased neck and arm pain. [R. 165]. Dr. Robertson explored the possibility of shoulder and cervical spine pathology. X-ray and MRI confirmed both. Rotator cuff surgery was planned and the possibility of cervical surgery considered for the bilateral foraminal stenosis discovered at the C5-6 level. [R. 164].

Plaintiff's back problems continued. In June 1993 medical records document his range of motion as: flexion 30, extension 20, lateral bend 20 degrees right and left with pain at extremes. [R. 161]. August 1993 range of motion: flexion 30, extension 10, lateral bend 10 degrees right and left with pain at extremes. [R. 158]. The history and physical recorded in conjunction with Plaintiff's September 1993 shoulder surgery documents "back motion is reduced." [R. 155].

One page of Dr. Robertson's office notes are not included in the record, so there is a gap from September 1993 to January 1994 when Plaintiff had his second back surgery.[3] The diagnosis for Plaintiff's January 1994 surgery was "herniated nucleus pulposus, C5-6 and C6-7 levels," and "cervical spondylosis, C5-6 and C6-7 levels" [R. 217]. Following surgery on Plaintiff's cervical spine, Dr. Robertson documents continued complaints of low back pain. In August 1994 and October 1994 Dr. Robertson's examination reveals tenderness, flexion 40, extension 20, lateral bend right and left, 20 degrees with pain at extremes. [R. 11]. On October 5, 1994, Dr. Robertson comments: "the patient's low back pain is really not significantly improved." *Id.*

The ALJ is required to discuss the evidence presented and to explain why he found that Plaintiff was not disabled under the Listings. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996). In the absence of ALJ discussion of the evidence and findings supported by specific weighing of the evidence, the Court cannot assess whether the evidence relied upon by the ALJ adequately supports the conclusion that Plaintiff's impairments did not meet or equal any Listed Impairment. The medical records document the diagnosis for Listing 1.05C together with pain, muscle spasm, muscle weakness and sensory loss also required by the Listing. While this Court is not to weigh the evidence or exercise its discretion, from a review of the record, it

[3] Dr. Robertson's progress notes are page numbered by means of filing in a blank at the top of each sheet. The record contains pages 1-17 [R. 151-182] and pages 19-23 [R. 7-11].

is the Court's impression that If Plaintiff has not met Listing 1.05C, he has certainly come close.

The Court also rejects the ALJ's citation of the opinions of disability examiners at pages 50-61 and 67-76 of the record as justifying his determination that Plaintiff's condition failed to meet the Listings. The examiners, having conducted their reviews in July and November 1993, before the second back surgery, had incomplete information upon which to base a decision. Furthermore, their review formed the basis for the initial and reconsideration denial of benefits. [R. 62, 77]. The Court finds that these opinions do not constitute substantial evidence. *Frey v. Bowen,* 816 F.2d 508, 515 (10th Cir. 1987) (evaluation forms, unaccompanied by thorough written reports or persuasive testimony are not substantial evidence).

Finally, the Court finds that the ALJ's pain analysis is insufficient under *Luna v. Bowen* 834 F.2d 161 (10th Cir. 1987). Despite having undergone three surgeries by the time of the ALJ's decision and four by the time of the Appeals Council denial with the prospect of a fifth surgery on the horizon, the Secretary asserts that there is "now no medically determinable impairment which could cause the claimant's complaints of intractable pain." [R. 35] [emphasis supplied]. Apparently, the Secretary asserts that because Plaintiff underwent treatment he cannot have disabling pain. However, Plaintiff contends that despite the treatment he continues to suffer disabling pain. Therefore the Secretary must consider all of the evidence in the record, including Plaintiff's "persistent attempts to find relief for his pain and his

willingness to try any treatment prescribed" in evaluating Plaintiff's allegation of disabling pain. *Luna* at 165.

It is therefore the order of the Court that the Secretary's decision denying benefits is REVERSED and the matter REMANDED for further proceedings consistent with this Order.

SO ORDERED this 14th day of August, 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY J. GILES,
SS# 447-54-2802,

Plaintiff,

v. NO. 95-C-340-M

SHIRLEY S. CHATER,
Commissioner of the Social Security Administration,

Defendant.

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 14th day of August, 1996.

Frank H McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

DONALD HERD,

Plaintiff,

vs.

LEDERLE LABORATORIES, a Division of AMERICAN CYANAMID COMPANY and its Parent Company AMERICAN HOME PRODUCTS,

Defendants.

Case No. 95-C-538-BU

JUDGMENT

This action came before the Court upon Defendants' Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants, Lederle Laboratories, a Division of American Cyanamid Company and its Parent Company American Home Products, and against Plaintiff, Donald Herd, and that Defendants, Lederle Laboratories, a Division of American Cyanamid Company and its Parent Company American Home Products, recover of Plaintiff, Donald Herd, their costs of action.

Dated at Tulsa, Oklahoma, this 14th day of August, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD HERD,

Plaintiff,

vs.

LEDERLE LABORATORIES, a Division of AMERICAN CYANAMID COMPANY and its Parent Company AMERICAN HOME PRODUCTS,

Defendants.

Case No. 95-C-538-BU

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendants, Lederle Laboratories, a division of American Cyanamid Company and its Parent Company American Home Products. Plaintiff, Donald Herd, has responded to the motion and Defendants have replied thereto. Based upon the parties' submissions, the Court makes its determination.

Plaintiff was employed by Defendants as a medical sales representative for approximately 33 1/2 years. Plaintiff was terminated from his employment on June 15, 1993. At the time of his discharge, Plaintiff was 59 years old. Plaintiff has brought the instant action alleging his termination was based upon his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, et seq. Defendants deny that Plaintiff's termination was in violation of the ADEA. Defendants specifically assert that Plaintiff's termination resulted from an elimination of certain sales territories nationwide and an inability to reassign Plaintiff to another sales position due to poor past performance.

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In their motion for summary judgment, Defendants contend that Plaintiff cannot, as a matter of law, establish a prima facie case of age discrimination. However, even if Plaintiff were able to establish a prima facie case, Defendants contend, as a matter of law, Plaintiff cannot prove that Defendants' articulated reason for his discharge was pretextual. Defendants maintain that an outside consulting agency recommended the dissolution of 26 sales territories, which dissolution resulted in the elimination of 12 sales positions, including Plaintiff's position. Defendants assert that the decision as to which sales territories were eliminated was made by referencing territory numbers, and not sales representatives' names. According to Defendants, efforts were made to reassign the displaced representatives, wherever possible, with past performance being the key, but that reassignment was not achievable in Plaintiff's case nor in 11 other instances, due to poor past performance. According to Defendants, the 11 other persons who were not reassigned were under the age of 40.

Plaintiff, in response, argues that he can carry his burden of proof. Plaintiff contends that the evidence establishes a prima facie case of age discrimination. Plaintiff further asserts that a genuine issue of fact exists as to whether or not Defendants' articulated reason for termination was pretextual. Plaintiff specifically contends the evidence shows that Defendants' performance evaluation system for Plaintiff was subjective and that they retained younger employees who were ranked lower in sales than Plaintiff.

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing the absence of a genuine issue of material fact, Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), and the Court must view the evidence in a light most favorable to the nonmoving party. Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995). Once the moving party has met its burden, the nonmoving party is not entitled to a trial merely on the basis of mere allegations. The nonmoving party must come forward and identify sufficient evidence to require submission of the case to a jury. Id. If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to summary judgment. Celotex, 477 U.S. at 323.

To establish a prima facie case of age discrimination, a plaintiff must show that (1) he was within the protected age group; (2) he was doing satisfactory work (he was qualified for the position); (3) he was discharged; and (4) he was replaced by a younger person. Jones, 54 F.3d at 630; Marx v. Schnuck Markets, Inc., 76 F.3d 324, 327 (10th Cir. 1996). In reduction in force cases, because a plaintiff is not always replaced with another employee, a plaintiff may demonstrate the fourth element by producing "'evidence circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to

discriminate in reaching the decision at issue.'" Branson v. Price River Coal Co., 853 F.2d 768, 770 (10th Cir. 1988)(quoting Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982)). The fourth element may also be shown by circumstantial evidence that a plaintiff was treated less favorably than younger employees. Jones, 54 F.3d at 630; Rea v. Martin Marietta Corp., 29 F.3d 1450, 1454 (10th Cir. 1994). In this regard, "'[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent. . . .'" Ingels v. Thiokol Corporation, 42 F.3d 616, 620 (10th Cir. 1994)(quoting Branson, 853 F.2d at 771).[1]

Once a plaintiff establishes a prima facie case of age discrimination, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. Rea, 29 F.3d at 1454. If the defendant meets its burden of production, "the presumption of discrimination established by the prima facie showing 'simply drops out of the picture.'" Ingels, 42 F.3d at 620 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993)). "The plaintiff then carries the full burden of persuasion to show that the defendant discriminated on the illegal basis of age." Ingels, 42 F.3d at 620. "The plaintiff may do so by either showing that

[1]In his response brief, Plaintiff analyzes his case in regard to the prima facie case articulated in Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993). The Court opines that the prima facie case as articulated by the Tenth Circuit should be followed in the instant case.

the proffered reason is a pretext for illegal discrimination, or by providing direct evidence of discrimination." Id.

For purposes of summary judgment review, if the plaintiff produces both a prima facie case of age discrimination and evidence supporting a finding that the defendant's alleged nondiscriminatory reason was pretextual, the case should go to the trier of fact. Jones, 54 F.3d at 630; Ingels, 42 F.3d at 622.

In the instant case, there is no dispute that Plaintiff satisfies the first and third elements of the prima facie case. Defendants, however, argue in their motion that Plaintiff cannot establish the second and fourth elements--that he was qualified for the position he held and that he was treated less favorably than younger employees. As to the second element, Defendants argue that Plaintiff was not qualified for his sales position. They assert that he had received numerous unsatisfactory performance ratings, was ranked last in the Central Region as of 1992 and that he showed no signs of long-term improvement in his performance.

This Court notes that the Tenth Circuit has cautioned against considering an employer's proffered reason that it discharged the plaintiff because he was not performing satisfactory work in evaluating the sufficiency of a plaintiff's prima facie case. MacDonald v. Eastern Wyoming Mental Health Ctr., 941 F.2d 1115, 1118-22 (10th Cir. 1991). Rather, the employer's evidence is properly considered in addressing whether the articulated reason is legitimate or merely a pretext for discrimination. Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470 (10th Cir. 1992). A plaintiff

may make out a prima facie case of age discrimination by credible evidence that he continued to possess the objective qualifications when he was hired, or by his own testimony that his work was satisfactory, even when disputed by his employer, or by evidence that he had held his position for a significant period of time. MacDonald, 941 F.2d at 1121.

Here, Defendants, as part of their proffered reason for discharge, assert that Plaintiff could not be reassigned to another sales territory due to his poor past performance. This articulated reason is the same basis for attacking the second element of Plaintiff's prima facie case. In accordance with MacDonald, the Court finds that Defendants' explanation for discharging Plaintiff should be evaluated on the issue of pretext. Because the evidence shows that Plaintiff had been with Defendants for a significant period of time, specifically 33 1/2 years, the Court finds that Plaintiff has satisfied the second element of the prima facie case --that he was qualified for the position he held.

In regard to the fourth element, Defendants argue that Plaintiff has failed to present sufficient evidence from which a factfinder might reasonably conclude that Defendants intended to discriminate against him when they decided to reduce their force and when they decided not to reassign Plaintiff. Defendants specifically argue that Plaintiff has not shown that he was treated less favorably than younger employees. Upon review, the Court concludes that Plaintiff has submitted sufficient evidence to

satisfy the fourth element.[2] As previously stated, "[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent. . . ." Ingels, 42 F.2d at 621 (quoting Branson, 853 F.2d at 771). In the instant case, evidence in the record reveals that younger employees in similar positions as Plaintiff were not terminated during the reduction in force. Evidence specifically shows that Plaintiff's customers were reassigned to two medical sales representatives who were under the age of 40. Moreover, evidence shows that there were other persons under 40 in Plaintiff's district and region who were not terminated.

Even though Plaintiff has established a prima facie case of age discrimination, he cannot survive summary judgment unless the Court finds that "'the evidence, interpreted favorably to [Plaintiff], could persuade a reasonable jury that [Defendants] had discriminated against [Plaintiff].'" MacDonald, 941 F.2d at 1121 (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989)). Upon review of the evidence, the Court concludes that Plaintiff has failed to present sufficient evidence which would

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[2]In his brief, Plaintiff suggests that he can satisfy the fourth element of the prima facie case utilized in cases not involving a reduction in force--that he was replaced by a younger person. Plaintiff specifically asserts that Defendants have failed to offer any evidence to show that no one was hired for his position. Greg McClure, however, in his affidavit states that no person was hired to fill Plaintiff's position. This uncontroverted evidence is sufficient for summary judgment purposes. Rule 56, Fed. R. Civ. P. Therefore, the Court will address the fourth element of the prima facie case for reduction in force cases.

persuade a reasonable jury that Defendants discriminated against him based on his age.

Defendants have presented a "legitimate, nondiscriminatory reason for the decision" to terminate Plaintiff, see, Jones, 54 F.3d at 630 (quoting E.E.O.C. v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992)), by offering evidence that upon recommendation from an outside consulting agency, they eliminated 26 sales territories throughout the country and that they made efforts to reassign the displaced representatives, but were unable to reassign Plaintiff and 11 other representatives due to poor past performance.

To show that there is a genuine issue of fact as to whether Defendants' proffered reason is unworthy of credence, Plaintiff argues that there is contradictory evidence regarding whether an "outside consulting agency" actually recommended the elimination of the sales territories. Plaintiff specifically points to a ZS Associates letter signed by Craig H. Stinebaugh. In that letter, Mr. Stinebaugh stated: "Bob, I am a little confused since you referred to a realignment implemented in 1993 where 25 Division reps were eliminated. I do not have any files that correspond to this time frame." (Exhibit "A", Plaintiff's Response Brief). The Court, however, finds that this letter does not rebut Greg McClure's affidavit that the dissolution of 26 sales territories was made at the recommendation of an outside consulting agency. (Exhibit "B", Defendants' Brief). Mr. Stinebaugh simply states in his letter that he could not find the files in regard to the 1993

project. This does not prove that the study did not occur or that the recommendation discussed in Mr. McClure's affidavit was not made. Plaintiff also relies upon the deposition testimony of Joe Fitori, Plaintiff's immediate supervisor, that "I didn't know anything about any outside study." (Exhibit "B", Plaintiff's Response Brief). This, however, also does not rebut Mr. McClure's affidavit since Mr. Fitori specifically testified that he was not involved in the decision to terminate Plaintiff.

Plaintiff additionally argues that even if his sales territory were eliminated based upon "low" potential, he should not have been terminated as he ranked higher in sales than younger employees who were retained by Defendants. Although Plaintiff does not specifically identify which employees were ranked lower than he, it appears that he believes one of those employees to be Charles Ashby. (Plaintiff's Disputed Fact #9, Plaintiff's Response Brief). While there is evidence in the record that Mr. Ashby ranked lower than Defendant in the Gold Cup 1993 Standings, and in the selling of certain products, there is no evidence that Mr. Ashby ranked lower overall than Plaintiff or that his performance was ever rated "Performance that Needs Improvement" like Plaintiff. Also, at the end of 1992, Mr. Ashby was ranked higher than Plaintiff in the Central Region by Mr. Schulz.

Likewise, Plaintiff suggests that he was ranked higher than Danny Marley and Bob Hasselman. (Exhibit "T", Plaintiff's Response Brief). Mr. Marley and Mr. Hasselman, both under 40 years of age at the time, acquired Plaintiff's customers after the elimination

of Plaintiff's territory. While the evidence indicates that these individuals ranked lower in a few instances in selling certain products, these individuals ranked higher than Plaintiff in the Gold Cup 1993 Standings, in the selling of other products and in the overall ranking by Mr. Schulz in 1992. (Exhibit "W", Plaintiff's Response Brief).

Plaintiff also argues that his rankings as to certain products indicate that he was ranked above certain unidentified younger employees retained by Defendants. Plaintiff asserts that he was ranked 5 out of 9 in his district in the Subtotal Promoted Products analysis for the period of February through September 1992. In addition, Plaintiff contends that according to his Performance Planning Review Form for review period January, 1992 through December, 1992, he was 7 out of 9 in his district for Prostep Sales and 7 out of 9 for achievement of 105% of Sub-Total Promoted Products Budget. Plaintiff also argues that he was ranked 3 out of 9, earning Plaintiff a rating of "A" ("Achieved") for Total Standards Products Sales Budget. Plaintiff further argues that Mr. Fitori testified in his deposition that Plaintiff never ranked last and that there was always someone who ranked lower than Plaintiff. Mr. Fitori also completed several field contact reports which ranked Plaintiff 5th in the region for Prostep and 9th in the region for Verelan. Furthermore, Plaintiff argues that three months prior to his termination, he was ranked 22 out of 34 in the Central Region and 6 out of 9 in the district.

While Plaintiff has presented evidence to show that he ranked

higher than some persons in the rankings of sales of certain products, this evidence does not sufficiently demonstrate that he was ranked higher overall than younger employees retained by Defendants. There is an absence of proof by Plaintiff that the persons ranked lower than him in each product were the same persons. Mr. Fitori explained in his deposition that he could not assume from the rankings that there was someone else whose performance was consistently poorer than Plaintiff. (Exhibit "K", p. 72, ll. 14-21, Plaintiff's Response Brief). Moreover, there is an absence of proof that all of the persons who ranked below Plaintiff as to certain products were younger than Plaintiff.

Upon review of the record, the Court finds that Plaintiff has failed to show any evidence of pretext in regard to the reduction in force. Significantly, the undisputed evidence in the record shows the decision to terminate the sale territories was made by referencing territory numbers and not sales representatives. In addition, there were 11 other persons in addition to Plaintiff who were discharged. These 11 persons were younger than Plaintiff and were also not reassigned for poor past performance. (Exhibit "B", Defendants' Brief).[3]

As to Defendants' explanation that Plaintiff could not be reassigned based upon poor past performance, Plaintiff acknowledges

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[3]Plaintiff asserts in his response brief that Defendants have not provided evidence of the ages of the other 11 employees or the reasons for their termination. Defendants, however, presented such evidence through the affidavit of Mr. McClure. This is sufficient evidence for summary judgment purposes. Rule 56, Fed. R. Civ. P.

that he signed a letter dated February 10, 1993, stating that his performance was such that he was subject to termination. He also acknowledges that he had received a series of poor performance reviews dating from 1990. Plaintiff, however, disputes the methods and means of determining the level of his overall performance. He contends that the method of determining the "Performance that Needs Improvement" is questionable in light of the fact that Mr. Fitori and Plaintiff's Regional Sales Director, Ronald P. Happe, testified that they had no real guidelines to determine who rates an overall review of "Performance that Needs Improvement" and that such rating was determined in a very subjective manner.

Despite Plaintiff's allegations to the contrary, the testimony of Mr. Fitori did not reveal that the performance ratings were totally subjective. Mr. Fitori testified that the performance evaluation was both objective and subjective and that the objective was given more weight. (Exhibit "N", Plaintiff's Response Brief). Similarly, Mr. Happe testified that the performance evaluation was both objective and subjective. (Exhibit "O", Plaintiff's Response Brief).

Plaintiff also disputes his ranking by Duane Schulz, Regional Sales Director, of 65th out of 65th in 1992. Plaintiff has suggested that his ranking was intended to make Plaintiff "look bad" and was setting up "cause" for termination when Plaintiff refused to take early retirement as suggested by Mr. Fitori. Plaintiff though has presented no evidence to show that Mr. Schulz had any improper motive in his ranking of Plaintiff. Indeed, the

Court notes that several of the individuals ranked higher than Plaintiff by Mr. Schulz were over 40 years of age. (Exhibit "W", Plaintiff's Brief). In the absence of any improper motive, the Court cannot conclude that Plaintiff's ranking was based upon his age.

Plaintiff further disputes the 65th ranking on the basis of his previously discussed rankings as to certain products, the lack of any evidence as to what criteria Mr. Schulz used in determining the 65th ranking and Mr. Fitori's testimony that Plaintiff did not rank last in the sales of certain products. As previously stated, there is an absence of proof as to the persons who ranked lower than Plaintiff in certain products. Conclusory allegations that younger employees ranked lower than Plaintiff is not sufficient to withstand summary judgment. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 800 (10th Cir. 1993). In regard to a lack of evidence as to criteria, the Court finds that Defendant was not required to show what the criteria for the 65th ranking was. Defendants submitted the testimony of Mr. McClure that Plaintiff was ranked 65th and submitted the ranking of Mr. Schulz. With this evidence, they met their burden of production. It is Plaintiff who has the ultimate burden of persuasion that Defendants discriminated based upon age. Ingels, 42 F.3d at 621. As to Mr. Fitori's testimony, Mr. Fitori did not testify that Plaintiff ranked last overall. He merely testified that Plaintiff ranked last in each of the categories of products. As previously stated, Mr. Fitori explained that he could not assume from the rankings that there was

someone consistently poorer than Plaintiff. Mr. Fitori's testimony therefore does not rebut Mr. Schulz's ranking of Plaintiff.

Plaintiff, in his brief, also alleges that while his poor past performance was determined using budget and sales calculations provided by Defendants' home office, Mr. Fitori never verified or checked as to whether the budget for Plaintiff's territory was realistic. Plaintiff, however, has not presented any evidence to show that the budget was not realistic. Nor has he presented any evidence to show that Mr. Fitori was obligated to verify that the budget for Plaintiff's territory was realistic. Furthermore, Plaintiff has not presented any evidence to show that Defendants gave Plaintiff an unrealistic budget so that he would receive low performance evaluations from Mr. Fitori and Mr. Schulz.

Significantly, in regard to his performance rankings by Mr. Fitori and Mr. Schulz, the Court notes that Plaintiff specifically testified in his deposition:

> Q. Do you have any information that tells you that Joe Fitori did any of his rankings based upon your age?
>
> A. I--I have no reason to--to know any of this.
>
> Q. What about Duane Schulz?
>
> A. I have no idea.

(Exhibit "A", p. 114, Defendants' Brief.)

Finally, Plaintiff argues that certain comments relating to his retirement by Robert Happe, Kay McDevitt and Mr. Fitori show that the decision to terminate him was motivated by age. This Court disagrees. The Court concludes that these comments are "stray" remarks which have no connection to the alleged

discrimination. Palochko v. Manville Corp., 21 F.3d 981, 982 (10th Cir. 1994); Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994). None of the individuals who made the retirement comments had any input into the decision to terminate Plaintiff. Plaintiff suggests that Mr. Happe acted in a concerted effort to terminate Plaintiff but presents no evidence to substantiate that statement. Furthermore, Mr. Happe specifically testified at his deposition that he was not involved in Plaintiff's termination and that as of February 1, 1992, he had no further contact with Plaintiff. (Exhibit "F", Defendants' Brief). The Court acknowledges that Mr. Fitori gave Plaintiff performance ratings of "Performance that Needs Improvement." Nonetheless, the Court notes that Plaintiff's prior supervisor, Mr. Deloach, likewise gave Plaintiff the same rating in 1990 and 1991. Plaintiff has presented no evidence of discriminatory intent by Mr. Deloach. The Court further notes that Mr. Fitori did not participate in Plaintiff's discharge. Therefore, the Court concludes that alleged comments, which were isolated and unrelated to the challenged action, are insufficient to create an issue for the jury as to whether Defendants' proffered reason for discharge was pretextual. Cone, 14 F.3d at 531.

In conclusion, the Court, having considered the evidence in the record in a light most favorable to Plaintiff, finds insufficient evidence to support a finding that Defendants' legitimate articulated reason for Plaintiff's discharge was pretextual. The Court concludes that no genuine issue of fact

exists and that Defendants are entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. Accordingly, the Motion for Summary Judgment filed by Defendants, Lederle Laboratories, a Division of American Cyanamid Company and its Parent Company American Home Products (Docket Entry #22) is **GRANTED**. In light of the Court's ruling, the Court **DECLARES MOOT** the Motion in Limine Regarding the 1991 Memorandum (Docket Entry #20) and the Motion in Limine Regarding "Mini-Trials" of Other Alleged Acts of Discrimination (Docket Entry #21) filed by Defendants Lederle Laboratories, a Division of American Cyanamid Company and its Parent Company American Home Products and **DECLARES MOOT** the Joint Motion to Reconsider (Docket Entry #30).

ENTERED this 14th day of August, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN DAVID HOWARD; MELISSA L. TOUSIGNANT; Ccentury XXI EAST, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95cv 1093BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14th day of August, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **John David Howard**, appears by his attorney, Matthew J. Nowinski; the Defendant, **Melissa Tousignant**, appears not having previously filed a Disclaimer; and the Defendant, **Century XXI East, Inc.**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **John David Howard**, was served with process a copy of Summons and Complaint on April 1, 1996; that the Defendant, **Century XXI East, Inc.**, signed a Waiver of Summons

Complaint on November 27, 1995; that the Defendant, **Melissa Tousignant**, acknowledged receipt of Summons and Complaint on April 19, 1996, by Certified Mail.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their Answers on November 16, 1995; that the Defendant, **John David Howard**, filed his Answer on May 16, 1996; that the Defendant, **Melissa Tousignant**, filed her Disclaimer on May 8, 1996; and that the Defendant, **Century XXI East, Inc.**, has failed to answer and its default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, **John David Howard**, is a single unmarried person.

The Court further finds that on July 6, 1979, Sandra Kay Hall, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., her mortgage note in the amount of $36,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, Sandra Kay Hall, a single person, executed and delivered to FIRST CONTINENTAL MORTGAGE CO., a real estate mortgage dated July 6, 1979, covering the following described property, situated in the State of Oklahoma, Tulsa County:

**LOT TWENTY-FIVE (25), BLOCK FIVE (5),
CENTURY 21 EAST TO THE CITY OF TULSA,
COUNTY OF TULSA, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT
THEREOF.**

This mortgage was recorded on July 10, 1979, in Book 4412, Page 599, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 31, 1979, FIRST CONTINENTAL MORTGAGE CO., assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on August 6, 1979, in Book 4418, Page 526, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 22, 1990, FEDERAL NATIONAL MORTGAGE ASSOCIATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 11, 1990, in Book 5258, Page 1017, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, JOHN DAVID HOWARD, currently holds title to the property by virtue of a Sheriff's Deed, in a Foreclosure, Case No. CJ 92-01102, dated February 24, 1993, and recorded on May 16, 1994, in Book 5625, Page 210, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **John David Howard**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **John David Howard**, is indebted to the Plaintiff in the principal sum of $50,803.70, plus interest at the rate of 10 percent per annum from March 23, 1995, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad

valorem taxes in the amount of $370.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $18.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Century XXI East, Inc**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Melissa Tousignant**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment IN REM against the Defendant, **John David Howard**, in the principal sum of $50,803.70, plus interest at the rate of 10 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.81 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County** Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $370.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $18.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **John David Howard, Century XXI East, Inc., and Melissa Tousignant** and **Board of County Commissioners**, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **John David Howard**, to satisfy the judgment IN REM of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $370.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $18.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

MATTHEW J. NOWINSKI, OBA #12151
5800 South Lewis Avenue, Suite 199
Tulsa, Oklahoma 74105
(918) 748-8998
Attorney for Defendant,
John David Howard

Judgment of Foreclosure
Civil Action No. 95cv 1093BU

LFR:flv

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TULSA BRANCH, Plaintiff,	)	
vs.	)	Case No. 96-C-717-B
CITY OF TULSA, Defendant.	)	

ORDER DISMISSING WITHOUT PREJUDICE

NOW on this 13 of August, 1996, this matter comes on before me, the undersigned Judge of the United States District Court. After due consideration, the Court FINDS AND ORDERS AS FOLLOWS:

1. This action is dismissed without prejudice.

It is so ordered this 13 day of August, 1996.

s/ TERRY C. KERN

for THOMAS R. BRETT,
UNITED STATES DISTRICT JUDGE

NAACP.ORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. PROCEEDS IN THE AMOUNT OF THREE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED ELEVEN AND 62/100 DOLLARS ($370,811.62) FROM SALE OF REAL PROPERTY LOCATED AT: SEVEN SAILVIEW ROAD, MOORESVILLE, IREDELL COUNTY, NORTH CAROLINA, a/k/a LOT SEVEN (7), ALEXANDER ISLAND SUBDIVISION, IREDELL COUNTY, NORTH CAROLINA, Defendant.	CIVIL ACTION NO. 96-C-0196-H

ENTERED
DATE 8-14-96

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of August 13th, 1996, and the Declaration of Assistant United States Attorney Catherine Depew Hart, that all parties in interest, if any, to the following-described defendant currency, to-wit:

PROCEEDS IN THE AMOUNT OF THREE HUNDRED SEVENTY THOUSAND EIGHT HUNDRED ELEVEN AND 62/100 DOLLARS ($370,811.62) FROM SALE OF REAL PROPERTY LOCATED AT:

SEVEN SAILVIEW ROAD, MOORESVILLE, IREDELL COUNTY, NORTH CAROLINA, a/k/a LOT SEVEN (7), ALEXANDER ISLAND SUBDIVISION, IREDELL COUNTY, NORTH CAROLINA,

against which judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend as to the defendant currency, as provided by the Federal Rules of Civil Procedure:

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter default as to the above-described defendant currency as to all persons and/or entities, by virtue of their failure to file claims, if any, to said defendant currency.

DATED at Tulsa, Oklahoma, this 13th day of August, 1996.

PHIL LOMBARDI,
Clerk, U. S. District Court

By: S. Adamski
Deputy

N:\UDD\CHOOK\FC\SECHREST\05364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 13 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

VALERIE HECHT,

Plaintiff,

vs.

ENGINEERING DESIGN GROUP, INC.,

Defendant.

Case No. 95 C 1205 E

ENTERED ON DOCKET
DATE 8-14-96

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Valerie Hecht, and the Defendant, Engineering Design Group, Inc., hereby stipulate to the dismissal with prejudice of this case, each party to bear her or its own costs, expenses and attorneys' fees.

Leslie C. Rinn, OBA # 12160
2121 S. Columbia, Suite 710
Tulsa, OK 74114
(918) 742-4486

ATTORNEY FOR PLAINTIFF

Lynn Paul Mattson OBA # 5795
Kristen L. Brightmire, OBA #14239
Doerner, Saunders, Danial & Anderson
320 S. Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211

ATTORNEYS FOR DEFENDANT

Valerie Hecht, Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY P. SUDER,

Plaintiff,

vs. No. 95-CV-946-K

BLUE CIRCLE, INC., an Alabama corporation,

Defendant.

O R D E R

On December 13, 1995, Magistrate Judge Joyner entered his Report and Recommendation regarding Plaintiff's motion for award of attorneys' fees [Doc. #14]. The Magistrate Judge recommended that the motion be granted and Plaintiff be awarded $962.50 in attorneys' fees. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

Therefore, it is the Order of the Court that the motion of the Plaintiff for attorneys' fees is hereby GRANTED [Doc. #9] and that Plaintiff recover the sum of $962.50 from Defendant.

ORDERED this 9 day of August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER-CHEM COAL COMPANY, a wholly owned subsidiary of INTERNATIONAL CHEMICAL COMPANY, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 95-C-183-K
ALTERNATIVE FUELS, INC., a South Carolina corporation, KRISMON KOAL, LTD., a Kentucky corporation and SUPREME FUELS CORPORATION, a Florida corporation,	)	
Defendants.	)	

ORDER AND JUDGMENT

On this 11th day of July, 1996, came on before this Court the Pretrial hearing scheduled in the above captioned case. Present on behalf of Plaintiff were attorneys, David W. Mills, and general counsel for Plaintiff, Laurence Yeagley. Present on behalf of Defendant, Alternative Fuels, Inc., was attorney, Grant E. Cheadle. Krismon Koal, Ltd., appeared not, and Defendant, Supreme Fuels Corporation, having been earlier dismissed from the action, was not required to attend. Upon motion of Defendant, AFI, to enter judgment on its Cross-Claim against Krismon, the Court received oral argument of counsel; and upon review of the pleadings on file, made the following findings:

1. AFI has a valid and existing cross-claim against Defendant, Krismon.

2. Krismon failed and refused to participate in the case management conference earlier held before this Court.

3. Krismon failed and refused to participate in the preparation of a pretrial order.

4. Krismon failed to appear at the normal setting for the scheduled pretrial conference.

5. AFI seeks judgment against Krismon for the amount of $90,695.86.

6. Rule 16 of the Federal Rules of Civil Procedure, as well as local Rule 16.2 regarding pretrial, require a party or the party's attorney to participate in good faith in both scheduling and pretrial conferences. The Court, upon motion, may make such orders with respect to pretrial proceedings as are provided in Rule 37(b)(2)(C).

7. Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure permits the Court to render a judgment by default against a disobedient party failing to participate in the pretrial procedures before the Court.

8. Upon review of the argument made by counsel for AFI, this Court finds that judgment should be rendered against Krismon and in favor of AFI for the amount of $90,695.86 for the failure of Krismon to participate in the case management and pretrial proceedings.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that default judgment be granted against Krismon Koal, Ltd., and in favor of Alternative Fuels, Inc., in the amount of $90,695.86; that said judgment shall accrue interest at

the statutory rate from this day forward; and that AFI may file an application for attorney's fees and costs within thirty (30) days hereof if said fees are to be requested.

Dated this 9 day of ~~July~~ August, 1996.

TERRY C. KERN
United States District Judge

CHEADLE & ASSOCIATES, INC.
Attorneys for Alternative Fuels, Inc.

By: _____
Grant E. Cheadle, OBA #1634
610 South Main, Suite 210
Tulsa, OK 74119-1257
(918) 585-8500

DAVID W. MILLS, ESQ.
Attorneys for Inter-Chem Coal Company

By: _____
David W. Mills, OBA #11678
610 South Main, Suite 212
Tulsa, OK 74119-1257
(918) 585-8688

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NANCY L. TRENERRY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 94-C-791H
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL

COME NOW Plaintiff, pro se, and Defendant United States of America, by and through undersigned counsel, and hereby stipulate pursuant to Fed. R. Civ. P. 41(a)(1)(ii) to the dismissal of the captioned case with prejudice.

Respectfully submitted.

William K. Rounsborg/date
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044
(202)514-5987
Counsel for Defendant

Nancy L. Trenerry/date
144 South 107th East Avenue
Tulsa, OK 74128-1430
(918)437-7440
Plaintiff, pro se

U.S. Department of Justice

Tax Division

Special Litigation Section

LCA:EJS:WKRounsborg:ag
5-59N-5655 CMN:9491198

Post Office Box 227
Washington, DC 20044

Telephone: (202) 514-5987
Telecopier: (202) 514-6866

August 8, 1996

FEDERAL EXPRESS

Nancy Trenerry
144 South 107th East Avenue
Tulsa, OK 74128-1430

Re: Nancy L. Trenerry v. United States,
Case No. 94-C-791B (USDC N.D.Okla.)

Dear Ms. Trenerry:

Please be advised that after careful consideration, your offer to settle the referenced case has been accepted on behalf of the Attorney General. In that regard, the terms of settlement are as follows.

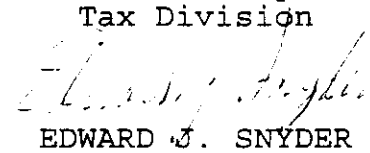
The United States will accept in full satisfaction of all federal income tax, interest, penalties, and any other additions to tax for the calendar years 1981, 1982, and 1988 through 1992, inclusive, all monies collected and applied to such liabilities through May 16, 1996, as indicated on the Master Transcript of that date which we earlier provided to you. In return, you will dismiss all claims in the referenced case with prejudice, and in additional you will enter satisfaction of judgment with respect to costs awarded to you in the case entitled Trenerry v. Internal Revenue Serv., Case No. 90-C-0444-B (USDC N.D. Okla.).

In that regard, enclosed please find a proposed stipulation of dismiss of the referenced case. If the stipulation meets with your approval, please execute and file the same, and return a copy as receipt stamped by the Court to this office in the enclosed, self-addressed, business-reply envelope. Also, please provide us with a proposed satisfaction of judgment in Case No. 90-C-0444-B, as soon as possible.

Thank you for your prompt attention and assistance in this matter. If you have any questions, please contact Mr. Rounsborg at (202)514-5987.

Sincerely yours,

LORETTA C. ARGRETT
Assistant Attorney General
Tax Division

By: 

EDWARD J. SNYDER
Chief, Special Litigation

Enclosures
cc: Michael J. O'Brien, Esq.
District Counsel
Internal Revenue Service
55 North Robinson, Room 830
Oklahoma City, OK 73102-9233
[Your ref: CC:SW:OKL-GL-1143-94 CAJones]

Hon. Stuart L. Brown
Chief Counsel for the
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224
[Your ref: CC:EL:D 3160-94 Br3:AMGulas]

Stephen C. Lewis, Esquire
United States Attorney
Northern District of Oklahoma
3900 U. S. Courthouse
333 West Fourth Street
Tulsa, OK 74103
[Attn: Phil Pinnel, Esq., AUSA]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAMORU KAWADA, Individually, and MAMORU KAWADA, as Shareholder of NANCI INTERNATIONAL JAPAN, a Japanese corporation,	)	
Plaintiff,	)	
v.	)	No. 95-CV-108-H
ELIAS MASSO, Individually, and as President of NANCI CORPORATION INTERNATIONAL; NANCI MASSO, Individually and as Chairman of NANCI INTERNATIONAL JAPAN; and NANCI CORPORATION INTERNATIONAL, an Oklahoma corporation,	)	
Defendants.	)	

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, through his attorney of record, and the Defendants, through their attorney of record, and would show the court that this matter has been compromised and settled and, therefore, move the court for an Order Of Dismissal With Prejudice of all claims of all parties.

MAMORU KAWADA

MARTHANDA J. BECKWORTH/K. Clark Phipps
Attorney for Plaintiff

ELIAS MASSO

NANCI MASSO

Elias Masso as President of
NANCI CORPORATION INTERNATIONAL

Nanci Masso as Chairman of
NANCI INTERNATIONAL JAPAN

Rosemary Burgher
Attorney for Defendants

333\290\stip.dlb\MJB

ENTERED ON DOCKET
DATE 8/14/96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 13 1996 SAC

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH R. CLEVELAND,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

Case No: 95-C-456-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed August 12, 1996.

Dated this 12th day of August, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

10

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH R. CLEVELAND)
)
Plaintiff,)
)
v.)
) Case No. 95-C-456-W
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,[1])
)
Defendant.)

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Dana E. McDonald (the "ALJ"), which summaries are incorporated herein by

---

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

9

reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform work-related activities, except for work involving more than the occasional lifting of up to fifty pounds, more than the frequent lifting or carrying of

---

[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

up to twenty-five pounds, and significant dealing with the public. He found that claimant's past relevant work as an automobile detailer did not require the performance of work-related activities precluded by these limitations, so the impairments did not prevent him from performing his past relevant work. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ ignored claimant's nonexertional impairments of pain, headaches, ringing ears, dizziness, and jaw joint problems.

(2) The ALJ ignored claimant's mental problems.

(3) The ALJ erred in concluding that claimant could do medium work, after noting that claimant's doctor said he could only carry twenty-five pounds.

(4) The ALJ erred in not consulting with a vocational expert to determine claimant's ability to work in light of his exertional and nonexertional limitations.

(5) The ALJ erred in finding that plaintiff could return to his past relevant work without adequate evidence and without making the findings required by law as to the requirements of claimant's past work and comparisons with his capabilities and limitations.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has been unable to work since January 9, 1993, when he suffered head injuries in an automobile accident. (TR 118, 167). He

complains that his head hurts continually, his vision is blurred, his jaw pops and hurts, his ears ring, and he suffers dizzy spells and memory loss. (TR 118-119).

Claimant's treating doctor, Dr. David Duncan, reported on January 30, 1993, that since the accident, claimant had been having frequent headaches and neck and back pain, was very nervous, had loose teeth, and had a contusion on his jaw. (TR 180). The doctor concluded he had "post-concussion syndrome, cervical and lumbar sprain, and a contusion." (TR 181). The doctor recommended that an MRI be done, along with physical therapy and anti-depressant medications. (TR 181). Claimant refused EMG and nerve conduction studies on his spine. (TR 181).

On February 11, 1993, an MRI of claimant's brain was performed, which showed he had "very small bilateral extra-axial fluid accumulations, consistent with the clinically questioned diagnosis of subdural hematoma. . . . There is some flattening and effacement of the sulci over the cephalad regions of both convexities. . . . There is no evidence of cortical injury or deep white matter abnormality." (TR 174). The doctor concluded that these findings were consistent with the patient's history of a recent motor vehicle accident. (TR 174).

On May 3, 1993, claimant was treated by Dr. Varsha Sikka at the Northeast Oklahoma Rehabilitation Hospital and went through a comprehensive program, including physical therapy, occupational therapy, psychology, social services, and rehabilitative nursing. (TR 187). He also had an MMPI. (TR 187). Initially, when his doctor sent him to the hospital, he was not sure that he wanted to go through a pain management program. (TR 190). But he eventually gave "200% of his cooperation"

and agreed to the program. (TR 192).

The goal of the program was to decrease claimant's pain and pain medications and increase his activities, so he could return to his previous vocation. (TR 192). The doctor reported that in the beginning, " he was very agitated and uncooperative, but then, after discussing this with him, he became cooperative and would follow directions." (TR 187). The doctor went on to say: "According to the patient, tenderness in the entire spine, but this was a normal examination. No spasm. No warmth noted. Spurling's test was negative. Neurologic examination also was essentially normal." (TR 187). During the hospitalization "most of his pain medication decreased," and claimant was started on Tegretol and Elavil. (TR 187).

Dr. Sikka reported that "[t]he patient did fairly well. By the time he was discharged [on May 14, 1993], he was much relaxed. He was able to manage his pain. He was very active. He was participating in all therapies. He was independent in self-care and independent in mobility. The patient also presented in the team conference and was told that he had mostly soft tissue injury and he should continue with a home exercise program, and he could return to light-duty work where he did not have to lift more than 30 pounds of weight. The patient met his long-term goals." (TR 187). It was recommended that "he should have psychologic counseling through the Community Mental Health Program and continue his home exercise program." (TR 188).

On May 14, 1993, a hospital team conference reported that "the patient possesses good prognosis to continue independence in his home environment and

community." (TR 194). However, on June 2, 1993, in a two-sentence letter, Dr. Duncan reported that he had been treating claimant since the accident and he was "at this time temporarily totally disabled, and will remain so for an indefinite time." (TR 150).

On July 1, 1993, Dr. Duncan reported: "[o]n June 21, 1993 the patient had achieved maximal recovery, and was released from treatment. At that time it is my opinion that the patient had achieved some improvement in his condition. However he continues to have constant bilateral tenitis with intermittent vertigo. He notes hyperesthesia of the left hip region. His cervical pain is diminished. He complains of chronic and constant low back pain and continues to have recurring headaches. Mr. Cleveland was released to return to normal activities as he might be able to tolerate them. He was encouraged to continue the exercise program that had been instituted during therapy." (TR 149). Dr. Duncan noted that Dr. James Lee, a psychologist, was seeing claimant and he "continued to have abnormal behavior and was easily angered" and had paranoid ideations and memory difficulties (TR 148). This was not Dr. Duncan's diagnosis, but merely a report on Dr. Lee's findings, based solely on claimant's contentions.

On July 13, 1993, Dr. Lee reported that claimant was having headaches, could not sleep or concentrate, and was angry and irritable all the time. (TR 183). Claimant told Dr. Lee the hospitalization had not helped him at all, but made him worse. (TR 183). On the basis of claimant's complaints, Dr. Lee concluded: "I cannot help him. In fact, he impresses me as being totally disabled at this time.

Suggested to him that he talk with his lawyer to apply for SSI. He is very angry and frustrated. Cannot drive at all. Says he feels like someone is driving a nail through his head. Totally frustrated man. Noise bothers him, eyes blur." (TR 183).

Almost a year later, on April 5, 1994, claimant was examined by Dr. George Blake. (TR 214-216). The doctor reported: "His attitude is flippant. The degree of cooperation is nil. No involuntary movements were noted. He walked in with a slight limp but when he left when he thought he was not being observed his limp seemed to go away. His history of the mental illness is obtained from the claimant and is very unreliable. The claimant obviously had his own agenda in order to prove that he was disabled throughout the interview. He was faking and apparently misrepresenting throughout the interview." (TR 214).

Dr. Blake found during a formal mental status examination that he made very poor eye contact and was "very evasive." (TR 215). "He sat throughout the interview with his eyes closed and would only respond and open his eyes when there is something that he wanted to answer. Little discomfort or pain was noted. His speech was regular tone, regular rate." (TR 215). As to calculations, the doctor reported: "I asked him to subtract 3 from 20 serially and he came up with "15" which I think was an approximation, allah Ganser's syndrome."[4] (TR 215-216). The doctor noted that : "further revealing his lack of veracity, he said, 'Oh! Disability, that is

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[4]"Ganser's syndrome" is a disorder characterized by the individual, who is not psychotic, mimicking behavior he or she thinks is typical of a psychosis, such as providing nonsense answers, and doing things incorrectly, according to Taber's Cyclopedic Medical Dictionary.

what this is for?'" (TR 216). The doctor concluded that claimant was malingering and had an antisocial personality disorder. (TR 216).

On May 3, 1994, another consultative examination was done by Dr. Angelo Dalessandro. The doctor found him "somewhat uncooperative and hostile." (TR. 219). The doctor reported that "[h]is temporomandibular joints showed tenderness to palpation and movement. Any movement of any joint would result in pain. Lumbodorsal movement was very limited with pain. There appeared to be decreased strength in the left leg at about 50 percent less as compared to the right. . . . There was no evidence of muscle atrophy or paralysis." (TR 220).

Dr. Dalessandro found "[t]here appeared to be decreased sensory, motor, and vibratory sensation in the left lower extremity." (TR 221). The doctor concluded that claimant had post head trauma status, but ruled out anxiety depressive illness, disk disease, and chronic lumbar strain. (TR 221). The doctor noted that claimant was hostile, and "[m]ovement of all joints was slow with 'pain present'" and no joint deformities were noted. (TR 221). "At this time it is difficult to ascertain if the patient is truly in the extreme pain he purports to be in. A mental evaluation is recommended to determine if depression is present and somatization is present." (TR 221).

There is no merit to claimant's contentions. The ALJ did not ignore claimant's non-exertional complaints of pain, headaches, ringing ears, and jaw joint problems. These are all discussed in his opinion. (TR 25-30). The court noted that symptoms must be based on a medically determinable impairment which are their cause. (TR

27-28). The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). Plaintiff's testimony alone cannot establish disabling pain. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992).

Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). Such findings are to be closely linked to substantial evidence and not just a conclusion. Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988). There is substantial evidence to support the ALJ's finding that claimant was not credible. While claimant suffered a head injury in January of 1993, there is no medical evidence of significant permanent impairments which would cause disability after May of 1993, when he was released to light duty work by his doctors. (TR 187). Two consulting physicians questioned his credibility. (TR 214, 216, 221).

The ALJ also did not ignore claimant's alleged mental impairments (TR 25-30), but found that they had not restricted his daily activities, social functioning, or ability to work. (TR 25-26). The court in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must evaluate a claimant's mental impairment only if the record contains evidence that he has mental

impairment which would prevent him from working. Two consultative examiners found that claimant was malingering. (TR 214, 216, 221). The only psychologist who found claimant totally disabled gave no objective findings in support, but relied on claimant's subjective complaints. (TR. 183). The ALJ noted this and properly disregarded the opinion. (TR 27-28). "A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. U.S. Dept. of Health & Human Servs., 52 F.3d 288, 289-290 (10th Cir. 1995).

The ALJ did not err in concluding that claimant could do medium work, which requires lifting fifty pounds at a time and carrying twenty-five pounds frequently. While he was limited to lifting no more than thirty pounds in May of 1993, the examination of his spine at that time was normal, with no spasms or warmth, and the Spurling's test was negative. (TR 187). The ALJ noted this. (TR 27). There is no medical evidence in the record of a back injury or condition which would limit claimant's ability to lift fifty pounds, and no physician concluded this after May of 1993. Given claimant's lack of credibility and the objective medical findings, his claims of back problems are highly suspect.

The ALJ did not err in failing to call a vocational expert to testify as to claimant's ability to work. Only after a determination is made that a claimant suffers from an impairment or combination of impairments severe enough to preclude him from returning to his prior work activity is the ALJ under an obligation to obtain vocational expert testimony as to other available employment. Diaz, 898 F.2d at 776. The ALJ found no impairment severe enough to preclude claimant from

returning to his past relevant work as an automobile detailer.

Finally, there was substantial evidence that claimant could do this work. The Tenth Circuit in Henrie v. U.S. Dept. Of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), found that an ALJ must consider the specific demands of claimant's past relevant work and compare these with his residual functional capacity to conclude that he can do his past job.

In this case the ALJ determined that the entire record, including the questions raised by the examining physicians and the absence of corroborating medical evidence, showed only an inability to deal with the public, and was consistent with a residual functional capacity for medium work. (TR 29). He then referred to the Dictionary of Occupational Titles to examine the demands of claimant's prior work as an automobile detailer and found it was "medium work activity with no tasks or duties which suggests dealing with the public would be required." (TR 30). Claimant set out the duties of his auto detailing job in his August 16, 1993 disability report as "clean cars, paint sign, deliver cars, pick up cars." (TR 123). The ALJ concluded that claimant had the capacity to do this work given his residual functional capacity. (TR 30). The ALJ properly complied with the law in his analysis.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 9th day of August, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD P. TAYLOR,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE,

Defendant.

Case No. 93-C-608-E

ORDER

In accordance with the Judgment of the Court of Appeals dated December 21, 1995, this matter is remanded to the Bankruptcy Court to make findings of fact on the issue of willfulness.

IT IS SO ORDERED THIS 8th DAY OF AUGUST, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

URALL O. EDWARDS,

Plaintiff,

vs.

SHIRLEY CHATER, Commissioner of the Social Security Administration,

Defendant.

Case No. 93-C-313-E

ORDER

Now before the Court is the Motion for Attorney Fees Pursuant to the Equal Access to Justice Act and Motion for Award of Costs (Docket #24) of the plaintiff Urall O. Edwards.

Plaintiff seeks an attorney fee of $6,225.00 plus costs of $320.38. Defendant does not object to the attorney fees and costs sought by plaintiff. The Court, therefore, finds that the claimant is the prevailing party in this matter and entitled to a reasonable attorney fee, and that the position of the United States was not substantially justified. The Court further finds that an enhanced fee is appropriate due to an increase in the cost of living since the implementation of the Equal Access to Justice Act. Therefore plaintiff's application for attorney fee and costs (Docket #24) is granted and plaintiff is awarded an attorney fee in the amount of $6225.00 and costs in the amount of $320.38.

IT IS SO ORDERED THIS 8th DAY OF AUGUST, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHNATHAN R. FREEMAN,
JOHN NORTH, and
ISRAEL SALDIVAR,

Plaintiffs,

v.

SHERIFF STANLEY GLANZ,
UNDERSHERIFF BILL THOMPSON,
CHIEF JIM HELM,
DEP. BOB MACKENCHNEY,
JACK PUTNAM,

Defendants.

No. 95-C-252-B

ENTERED ON DOCKET
DATE AUG 13 1996

ORDER

A Report and Recommendation of the Magistrate was filed July 2, 1996. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation and **DISMISSES** Plaintiff's action without prejudice.

Dated this 12th day of Aug. 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS WAITE and MARGARET WAITE,

Plaintiffs,

v.

NEOAX, INC., a Delaware corporation, BROUGHAM SEATING, INC., a Texas corporation, BUCO, INC., a Texas corporation, and DARYL HAYES,

Defendants.

Case No. 95-C-0263-H

ORDER

This matter comes before the Court on Defendant Daryl Hayes' motion to dismiss for lack of personal jurisdiction (Docket # 50).

Defendant Hayes filed this motion on April 29, 1996. Under Local Rule 7.1, Plaintiffs' response to Defendant's motion "shall be filed within fifteen (15) days." On May 14, 1996, Plaintiffs filed a motion to change the response deadline (Docket # 57); the Court granted this motion by minute order on May 15, 1996, giving the Plaintiffs an additional 30 days in which to respond. Plaintiffs have failed to respond to Defendant Daryl Hayes motion to dismiss for lack of personal jurisdiction. This failure "authorize[s] the court, in its discretion, to deem the matter confessed, and enter the relief requested." Local Rule 7.1 (C).

Even if the Court were not authorized to deem the lack of personal jurisdiction to be admitted, personal jurisdiction has not been established over Daryl Hayes.[1] In this regard:

> [t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the

[1] The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

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> plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted). Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id.

"The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. (citation omitted). In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that '[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.'" . Id. at 1416 (citations omitted).

The Rambo court stated that:

> Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); Doe v. Nat'l Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992)("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state."). The Supreme Court has explained that:

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another

> state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

In the present case, the Plaintiffs have failed to make even a prima facie showing of the constitutionally required minimum contacts between Defendant Daryl Hayes and the state of Oklahoma. The Defendant's brief in support of his motion to dismiss and his accompanying sworn affidavit indicate that the Defendant's only contact with the state of Oklahoma in the last twenty years was a drive through the state on a pleasure trip from Texas to Branson, Missouri. This sole contact is insufficient to give rise to general personal jurisdiction, and this contact has no connection with the present case such that specific personal jurisdiction could be had in Oklahoma.

Based on the foregoing, the Court holds that Defendant Daryl Hayes motion to dismiss for lack of personal jurisdiction (Docket # 50) is hereby granted.

IT IS SO ORDERED.

This 9TH day of August, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY RYALS,
SS#: 445-46-9544

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

Case No. 95-C-683-J

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY RYALS,
SS#: 445-46-9544

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

Case No. 95-C-683-J

ORDER[1/]

Plaintiff, Larry Ryals, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts that the ALJ erred in finding Plaintiff was not disabled because (1) Plaintiff meets a Listing, and (2) the ALJ failed to properly evaluate Plaintiff's mental impairment. For the reasons discussed below, the Court reverses the Commissioner's decision.

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[2/] Plaintiff filed an application for disability and supplemental security insurance benefits on November 6, 1993. [R. at 43]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge R.J. Payne Jr. (hereafter, "ALJ") was held September 22, 1994. [R. at 250]. By order dated October 19, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 18-31]. Plaintiff appealed the ALJ's decision to the Appeals Council. On May 26, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born January 9, 1948. [R. at 43]. Plaintiff completed high school and has an associates degree in fine arts. [R. at 253]. Plaintiff is currently enrolled in college credit classes. [R. at 254]. Plaintiff claims that he is no longer able to work due to his depression and his physical limitations. [R. at 266].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[3/] See 20 C.F.R. § 404.1520a. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work

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[3/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

> experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is

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[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five. At Step Three, the ALJ concluded that Plaintiff did not meet or equal a Listed impairment. The ALJ noted that although Plaintiff weighed 321 pounds in July 1993, Plaintiff's subsequent loss of 20 pounds (by November 1993) placed Plaintiff below the Listing level. The ALJ additionally determined that although Plaintiff's history revealed "chronic posttraumatic stress disorder secondary to Vietnam, major depression, and borderline personality disorder," Plaintiff could still perform his daily activities. After consulting a vocational expert, the ALJ concluded that Plaintiff could perform a significant number of jobs in the national economy and was therefore not disabled.

IV. REVIEW

THE LISTINGS

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. In his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

LISTING: OBESITY

Plaintiff argues that the ALJ erred in determining that Plaintiff did not meet Listing 9.09. Listing 9.09 provides:

> *Obesity.* Weight equal to or greater than the values specified in Table I for males . . . and one of the following:
>
> A. History of pain and limitation of motion in any weight-bearing joint, or the lumbosacral spine (on physical examination) associated with findings on medically acceptable imaging techniques of arthritis in the affected joint or lumbosacral spine; or
>
> B. Hypertension with diastolic blood pressure persistently in excess of 100 mm. Hg measured with appropriate size cuff; or
>
> C. History of congestive heart failure . . . ; or

> D. Chronic venous insufficiency with superficial varicosities in a lower extremity with pain on weight bearing and persistent edema; or
>
> E. Respiratory disease with total forced vital capacity equal to or less than 2.0 L. . . .

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.09 (italics in original).

Plaintiff asserts that at 68 inches tall he must weigh only 302 pounds to meet the Listing level. Plaintiff argues that because his weight exceeds 302 pounds and because he has arthritic findings in his lumbar spine, the ALJ improperly found that he did not meet the Listing.

The ALJ noted that although Plaintiff weighed 321 pounds in July 1993, by November 1993 he had lost 20 pounds and was below the required 302 pounds for the Listing requirement. [R. at 20]. However, the ALJ's conclusion is not supported by substantial evidence. In a telephone interview with a social security reviewer that was conducted on November 1, 1993, the reviewer noted that Plaintiff was five foot eight and weighed 300 pounds, having lost twenty pounds since July 1993. [R. at 116]. This is the sole support for the ALJ's conclusion. However, on several of Plaintiff's doctor visits, Plaintiff's weight was recorded. The record reflects that Plaintiff's weight on December 1, 1993 was 315 pounds. [R. at 155]. On December 3, 1993, Plaintiff weighed 317.5 pounds. [R. at 154]. On December 15, 1993, Plaintiff's weight was recorded as 307 pounds. [R. at 153]. Plaintiff's weight on August 4, 1993 was 306. [R. at 159]. At an examination on January 14, 1994, Plaintiff weighed 312.5 pounds. [R. at 165-66]. By July 25, 1994, Plaintiff's weight

was recorded at 339. [R. at 189]. On September 28, 1994, Plaintiff weighed 316, and on December 5, 1994, Plaintiff weighed 320. [R. at 246-47]. Substantial evidence does not support the ALJ's conclusion that Plaintiff weighed below the required Listing level of 302 pounds.

However, to meet the Listing, Plaintiff must also establish that he falls within one of the other requirements of § 9.09. Plaintiff asserts that the records establish that he has "arthritic findings in his lumbar spine." The Listings require a "history of pain and limitation of motion in any weight-bearing joint or the lumbosacral spine (on physical examination) associated with findings on medically acceptable imaging techniques of arthritis in the affected joint or lumbosacral spine." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.09. The ALJ concluded that Plaintiff had failed to meet his burden of proof for this requirement.

Plaintiff's records do indicate that he Plaintiff saw Guy E. Henning, M.D. for "back pain" in August of 1988. Dr. Henning noted that Plaintiff had mild pain. According to Dr. Henning, "X-rays of the back look normal to this examiner." [R. at 223]. An X-ray taken on August 18, 1988, of Plaintiff's back was interpreted by R.T. Knepper, M.D. as indicating "mild degenerative change." [R. at 224]. The ALJ's conclusion that Plaintiff failed to meet his burden of proof to establish the "second" requirement of Listing § 9.09 is supported by the record.

LISTING: MENTAL IMPAIRMENT

Plaintiff argues that the ALJ erred in determining that Plaintiff's mental impairment did not meet the Listings. Plaintiff asserts that he meets Listings 12.04, 12.06, or 12.08.

When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520a. Cruse v. D.H.H.S., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883 F. Supp. 1492, 1498 (D. Kan. 1995).

> This procedure first requires the Secretary to determine the presence or absence of 'certain medical findings which have been found especially relevant to the ability to work,' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria. See Woody v. Secretary of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988); 20 C.F.R. § 404.1520a(d). At the ALJ hearing level, the regulations allow the ALJ to complete the PRT form with or without the assistance of a medical advisor and require the ALJ to attach the form to his or her written decision Id.

Cruse, 49 F.3d at 617.

Once a medically determinable mental impairment is found to exist (*i.e.*, using Part "A" criteria), the severity of that mental impairment "is assessed in terms of the functional limitations imposed by the impairment. Functional limitations are assessed

using the criteria in paragraph B of the listings for mental disorders. . . ." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C). The following four functional areas are considered under Part "B" of Listings 12.04, 12.06, and 12.08: (1) activities of daily living;[5/] (2) social functioning;[6/] (3) concentration, persistence or pace;[7/] and (4) deterioration or decompensation in work or work-like settings.[8/]

In order for a claimant's mental impairment to be severe enough to meet or equal a mental impairment listing, the claimant must have sufficient limitation in at least two of the four functional areas mentioned above.[9/] The PRT form rates the degree of functional loss for the first two areas (*i.e.*, daily activities and social functioning) as "none," "slight," "moderate," "marked" and "extreme." Only a "marked" or "extreme" rating in these first two areas is significant enough to meet

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[5/] "*Activities of daily living* include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(1) (italics original).

[6/] "*Social functioning* refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. Social functioning includes the ability to get along with others. . . . Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority, e.g., supervisors, or cooperative behaviors involving coworkers." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(2) (italics original).

[7/] "*Concentration, persistence and pace* refer to the ability to sustain focused attention sufficiently long to permit the timely completion of tasks commonly found in work settings." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(3) (italics original).

[8/] "*Deterioration or decompensation in work or work-like settings* refers to repeated failure to adapt to stressful circumstances which cause the individual either to withdraw from that situation or to experience exacerbation of signs and symptoms (i.e., decompensation) with an accompanying difficulty in maintaining activities of daily living, social relationships, and/or maintaining concentration, persistence, or pace (i.e., deterioration which may include deterioration of adaptive behaviors). Stresses common to the work environment include decisions, attendance, schedules, completing tasks, interactions with superiors, interactions with peers, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(4).

[9/] Listing 12.08 requires limitation in three of the four areas. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.08.

or equal a mental impairment listing. The PRT form rates the degree of functional loss for the third area (*i.e.*, concentration, etc.) as "never," "seldom," "often," "frequent" and "constant." Only a "frequent" or "constant" rating in this third area is significant enough to meet or equal a mental impairment listing. The PRT form rates the degree of functional loss for the fourth area (*i.e.*, decompensation or deterioration) as "never," "once/twice," "repeated" and "continual." Only a "repeated" or "continual" rating in this fourth area is significant enough to meet or equal a mental impairment listing.

The ALJ in this case rated Plaintiff's functional limitations as a result of his mental impairments as slight in area one, moderate in area two, seldom in area three, and once/twice in area four. [R. at 30-31]. In other words, the ALJ found that Plaintiff's mental impairment did not "meet" the Listing level of severity in any of the four functional areas measured by Part "B" of the Listings.

A "Mental Residual Functional Capacity Assessment" was completed on April 1, 1994 by Janice C. Boon, Ph.D. The form indicates that Plaintiff's ability to understand and remember detailed instructions, his ability to carry out detailed instructions, and his ability to interact appropriately with the general public are all "moderately limited." Plaintiff was marked as "not severely limited" in all remaining categories. This form is not the same form about which the Tenth Circuit complained in Cruse v. D.H.H.S., 49 F.3d 614, 618 (10th Cir. 1995). However, as with the form in Cruse, the form completed by Dr. Boon does not exactly correspond to Part B of the listing requirements. However, Dr. Boon also completed a Psychiatric Review

Technique ("PRT") Form on April 1, 1994. Dr. Boon rated Plaintiff as "slight" in area one, "moderate" in area two, "seldom" in area three, and "once or twice" in area four. [R. at 78-86].

Plaintiff sought help for depression in early 1980. Plaintiff's records indicate Plaintiff was reported as suffering from depression, anxiety, feelings of frustration, and suicidal thoughts. [R. at 131-135]. Plaintiff was admitted for treatment on November 6, 1980, and discharged November 14, 1980. [R. at 135]. Plaintiff's discharge "problems" are noted as "anger remained."

Plaintiff was evaluated by James M. Lee, Ph.D., on June 29, 1993. Dr. Lee concluded that

> [t]he projective testing administered to the client showed evidence of an individual with a lot of underlying psychological and emotional problems. Mr. Ryals appeared to be experiencing posttraumatic stress disorder directly related to his problems with his military service [in Vietnam] in addition to having ongoing and severe major depression. He is a rather cynical individual with a very poor self-esteem and self-image and it is very likely that in a day-to-day situation other people will not only have problems in getting along with him but in misunderstanding his behavior.

[R. at 148]. Dr. Lee noted that Plaintiff suffered from "post-traumatic stress disorder, chronic type; and major depression." [R. at 149].

Ronald C. Passmore, M.D., examined Plaintiff on March 17, 1994. [R. at 174-76]. Dr. Passmore noted that Plaintiff did show signs of depression and would probably benefit from medication. [R. at 175]. In addition, Plaintiff exhibited "evidence of dependent personality traits." [R. at 175].

Plaintiff began treatment at the Family Mental Health Center on October 12, 1994. [R. at 237]. Plaintiff was assessed as suffering from major depression and post-traumatic stress disorder. [R. at 239]. Plaintiff's anticipated length of treatment was six months. [R. at 244]. Plaintiff's record contains progress reports only until November 23, 1994. [R. at 145]. (Plaintiff's hearing before the ALJ was on September 22, 1994).

Plaintiff testified that he had difficulty sleeping and occasionally has nightmares about his experiences in Vietnam. [R. at 258]. Plaintiff stated that he is unable to get along with co-workers and usually becomes angry. [R. at 255]. Plaintiff sometimes mows his neighbor's yard, and sometimes "visits the neighbor lady, the old woman." [R. at 256, 258].

The record does indicate that Plaintiff has a mental impairment. However, the ALJ's conclusion that Plaintiff's mental impairment was not of Listing level severity is supported by the record.

RFC: MENTAL IMPAIRMENT

If a claimant meets or equals a Listing, the claimant is disabled. 20 C.F.R. § 404.1520a(c)(2). If a claimant does not meet or equal a Listing, the claimant's residual functional capacity must be assessed to determine the level, if any, of the claimant's impairment. 20 C.F.R. § 404.1520a(c)(3). Plaintiff argues that even if the ALJ properly evaluated Plaintiff's mental impairment with respect to the Listings, the ALJ failed to accurately determine Plaintiff's RFC and did not present appropriate questions to the vocational expert.

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 404.1520a. Initially, the ALJ must determine whether or not a mental impairment exists. 20 C.F.R. 404.1520a(b). If the record indicates that a mental impairment exists, the ALJ determines "whether certain medical findings which have been found especially relevant to the ability to work are present or absent." 20 C.F.R. 404.1520a(b)(a). "The procedure then requires us to rate the degree of functional loss resulting from the impairment(s). Four areas of function considered by us as essential to work have been identified, and the degree of functional loss in those areas must be rated on a scale. . . ." 20 C.F.R. 404.1520a(b)(3). The four areas of function considered essential to the performance of work are the four areas discussed above with respect to the Listings: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 404.1520a(b)(3).

An ALJ must attach a PRT form detailing the ALJ's assessment of the four areas of function to his decision. 20 C.F.R. § 404.1520a(d). The ALJ's findings and conclusions must additionally be incorporated into the ALJ's decision. 20 C.F.R. § 404.1520a(c)(4); Washington v. Shalala, 37 F.3d 1337, 1442 (10th Cir. 1994).

The ALJ concluded that Plaintiff did have a severe mental impairment.

> [Claimant] has a long history of chronic posttraumatic stress disorder secondary to Vietnam, major depression, and borderline personality disorder.

[R. at 20]. In determining Plaintiff's ability to perform work in the four areas discussed above, the ALJ noted

> [C]laimant is capable of performing a variety of activities of daily living. In March 1994, claimant reported living with his youngest son, attending school classes, performing his own housework and cooking, and watching a significant amount of television. These activities normally require a significant amount of attention and concentration. The undersigned concludes that the record does not establish that claimant's mental disorder(s) have resulted in marked restriction of activities of daily living; marked difficulties in maintaining social functioning; deficiencies of concentration, persistence or pace frequently resulting in failure to complete tasks in a timely manner; or repeated episodes of deterioration or decompensation in work or work-like settings.

[R. at 21].[10/] In accordance with the regulations and Tenth Circuit case law, an ALJ must detail the information upon which he relied in determining an individual's mental RFC. The ALJ has simply not supplied sufficient information upon which to have based his conclusions. In addition, some of the ALJ's statements are not supported by the record.

The ALJ notes that Plaintiff lived with his son. At the hearing in September 1994, Plaintiff testified that he lived alone. [R. at 253]. A Social Security interview conducted on November 30, 1993 indicated that, at that time, Plaintiff did live with his son in a trailer house. When asked whether he got along with his son, Plaintiff's response was "yes-hardly ever see him." [R. at 117].

[10/] The ALJ addresses Plaintiff's mental impairment briefly in other areas of his decision. Generally, the ALJ's comments are repetitious of the above-quoted section. "Although claimant alleged he was reclusive, ... claimant reported to the psychologist, In June 1993, that he could work if he was alone. However, he further advised the physician that he had received an associate of arts degree in liberal arts in May 1993 and that he lived with his son which activities reasonably require some dealing with the public and interpersonal skills." [R. at 21-22]. "He has been capable of going to school almost daily in earning a degree in liberal arts. He maintains a trailer and has his son living with him. He was apparently capable of getting along with numerous medical examiners and apparently also their staff." [R. at 22-23].

The ALJ additionally noted that Plaintiff attended classes. At the time of the hearing Plaintiff testified that he was taking a computer graphics course, two days each week, which lasted approximately one and one-half hours. [R. at 253]. In a disability report completed November 1993, Plaintiff noted that he went to school five days per week, but no indication of the amount of time spent at school was given. [R. at 112, 117]. Plaintiff additionally noted that although he was working "very hard in school to talk and relate to people . . . crowds make me nervous and I have difficulty with interpersonal skills." [R. at 117].

The ALJ observed that Plaintiff was able to do his own cooking and housework. According to the disability report completed by Plaintiff, Plaintiff cooks one time each day, cleans once each week, and shops for groceries one time per month. [R. at 112]. In his "supplemental disability interview," Plaintiff noted that "I let my personal hygiene wait and can't get motivated to clean my surroundings. I forget to take care of my oral hygiene." [R. at 118]. Plaintiff additionally testified that he lost (or quit) six or seven jobs because he could not get along with people and on at least one occasion he almost came to blows with a co-worker. [R. at 267-68].

An ALJ is required to detail, in his decision, the basis for his determination of a claimant's mental impairment. 20 C.F.R. § 404.1520a(c)(4); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). In this case, although the ALJ provided some information to support his conclusions with respect to Plaintiff's mental impairment, the details provided are simply insufficient or not supported with substantial evidence. In addition, as outlined above, Plaintiff's mental impairment has

been evaluated by several doctors. However, the ALJ did not discuss Plaintiff's medical records or the weight he attributed to the various doctors in his opinion. See, e.g., Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987) (A treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence.").

On remand, the ALJ should evaluate Plaintiff's mental impairment, consistent with the Social Security Regulations and relevant case law, and provide a reasonably detailed analysis of the reasons and evidence supporting the ALJ's conclusions. See, e.g., Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects.") (citations omitted). In addition, the ALJ should review the medical evidence provided by the treating and reviewing doctors and indicate in his opinion the weight attributed to the information provided by the doctors.

Accordingly, the Commissioner's decision is **REVERSED and REMANDED** for further proceedings consistent with this opinion.

Dated this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REUBEN THOMAS,

Petitioner,

vs.

DENISE SPEARS,

Respondent.

No. 96-CV-204-K

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for consideration.

Petitioner is presently incarcerated pursuant to a conviction from the District Court of Tulsa County in Case No. CRF-86-393 and CRF-86-420 entered on May 13, 1986. Petitioner was sentenced to twenty-five years imprisonment.

On June 8, 1995, Petitioner filed the instant petition challenging the award and computation of time credits by the Oklahoma Department of Corrections (DOC). He alleges (1) that Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the amended earned-time credit statute) is an ex post facto law as applied to him and violates due process and equal protection, and (2) that he "was denied due process and equal protection of the law when he was convicted under a statu[t]e that allowed wide latitude of discretion by prison officials in the assignment of good-conduct and earned credits but provide[s] no meaningful standard to guide that discretionary classification."[1] On March 11, 1996, the U.S.

[1] In his last ground, Petitioner contends that there is "an absence of available state corrective process" through which to raise his grievance. In support of this contention, Petitioner points to the denial of his Petition for Writ of

District Court for the Eastern District of Oklahoma transferred this action to this Court.

I. BACKGROUND

In Turnham v. Carr, the Tenth Circuit Court of Appeals summarized the statutory provisions at issue in this case and the changes implemented by the DOC as a result thereof.

> Effective November 1, 1988, the State of Oklahoma substantially amended its inmate earned-time credit statute. Under the preamended version of the law, each prisoner received credits according to the job or activity to which he was assigned. Some jobs earned inmates three credit days for each day worked; others rewarded prisoners one-for-one. The statute also awarded inmates 20 credit days for each pint of blood that they donated, up to a maximum of 80 credit days per year.
>
> The amended statute significantly altered this system. Each inmate now earns credits according to his time spent in one of four classifications. For instance, an inmate earns 44 credits for spending a month in Class 4, whereas he earns no credits for time spent in Class 1. Okla. Stat. Ann. tit. 57, 138(D)(2) (West Supp. 1994). Inmates are assigned to a specific class level based on a variety of factors, including "rehabilitation, obtaining job skills and educational enhancement, participation in and completion of alcohol/chemical abuse programs, ... work attendance and productivity, conduct record, participation in programs, cooperative general behavior, and appearance." Id. 138(B). The amendments also eliminated the opportunity for inmates to earn credits by donating blood.

Mandamus and/or Habeas Corpus by the Atoka County District Court on the basis that he had failed to exhaust available administrative remedies and on the basis that he had failed to demonstrate that he would be entitled to immediate release. Respondent contends Petitioner's attempts to seek relief in the state courts were unsuccessful because he did not meet the requirements necessary for the relief which he was seeking. This Court agrees. In the alternative, the Court notes that this claim does not raise a constitutional claim cognizable in this habeas corpus action.

In Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals held that application of the amended statute to inmates convicted prior to November 1, 1988, "runs afoul of the prohibition of ex post facto laws." Id. at 95. The same court clarified its Ekstrand holding in State ex rel. Maynard v. Page, 798 P.2d 628 (Okla. Crim. App. 1990), where it stated that an inmate in Oklahoma was "entitled only to credits which were allowed under the law on the date the crime giving rise to his conviction was committed." Id. at 629.

After Ekstrand and Page, the DOC revised its system of awarding credits to permit inmates who committed their offense of conviction before November 1, 1988, to petition the Department for credits earned under the preamended version of the statute. The DOC, however, would not apply such credits to an inmate's sentence until 30 days before his discharge. Moreover, the DOC required the inmates themselves to keep track of the credits they earned under the old law.

In Scales v. Brewer, Unpub. Op., Case Nos. CIV-90-369-S and CIV-90-375-S (E.D. Okla., Apr. 7, 1993), the District Court for the Eastern District of Oklahoma adopted the findings of a federal magistrate judge who ruled that the DOC's new procedure for awarding time credits was also unconstitutional. The magistrate ruled that the DOC's application of the statute was ex post facto as applied to inmates who committed their offense of conviction before November 1, 1988, because it put such prisoners "at risk of continued confinement beyond their discharge date." Id. at 5.

Following Scales, the DOC again revamped its system of awarding time credits. The DOC now tabulates for each inmate how many credits he has earned under each version of the statute on a monthly basis and automatically awards the inmate the greater of the two totals.

Turnham v. Carr, 34 F.3d 1076, slip op. No. 94-5014, 1994 WL 413243 (10th Cir. Aug. 5, 1994) (unpublished opinion).

II. DISCUSSION

A. Ex Post Facto

In the instant habeas action, Petitioner contends that the

amended versions of sections 138 and 224 violate the Constitution's prohibition of ex post facto laws. Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be the subject of an ex post facto violation. If the credits under the 1981 statute exceed those under the 1988 amendments, Petitioner's sentence is reduced in accordance with the number of credits received under the 1981 statute for that month. If, on the other hand, credits under the 1988 statute are more advantageous, Petitioner's sentence is reduced in accordance with that statute for that month.

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). The DOC has implemented a procedure whereby Petitioner's circumstances are evaluated on a monthly basis, and Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation. See Turnham, 1994 WL 413243, at *2 (10th Cir. Aug. 5, 1994) (unpublished opinion) (holding that the 1988 amendments to sections 138 and 124 were not ex post facto laws). Therefore, Petitioner is not entitled to habeas corpus relief for violation of the Ex Post Facto Clause.

Next Petitioner complains about the fact that he has been

transferred several times to different facilities and about the change in class level at each of those transfers. For instance, he alleges that following his transfer from Dick Conner Correctional Center to Oklahoma State Penitentiary (OSP) in April 1989, he was demoted from class level 4, earning 44 credits, to class level 1, earning zero credit. He further alleges that jobs at OSP were contingent on being able to advance from pod 1 to pod 4, and that such advancement was arbitrary and depended on the officer's whims.

Petitioner has no constitutional right to be incarcerated in a particular cell or facility, and his transfers within the Oklahoma Department of Correction do not implicate a constitutional right of Petitioner. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Petitioner may have had in remaining at a particular facility is too insubstantial to rise to the level of due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

In the alternative, the Court finds that Petitioner did not have a liberty interest in remaining at class level 4. In Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974), the U.S. Supreme Court held that the Due Process Clause alone does not create a liberty interest in good-time credits. The Wolff court, however, recognized that once a state creates a right to good-time credits, the Due Process Clause protects that right from being arbitrarily abrogated. Id. at 557. Therefore, the issue in this case is whether Oklahoma law creates a justifiable expectation in remaining at the same credit level following a transfer to another prison.

The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty interest. See Sandin v. Conner, 115 S.Ct. 2293 (1995). In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnel, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976). Under Sandin, therefore, courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301.

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in this case. The inability to earn credits at the desired level does not "present

the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301. Petitioner alleges no law or facts that suggest the basis for any reasonable expectation on his part of a right to unearned good-time credits. Nor has the Court found any.

Moreover, Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986) (constitution does not create a property or liberty interest in prison employment). In any event, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978). See also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise).

To the extent Petitioner contends that the assignment to prison employment violates the Equal Protection Clause of the Fourteenth Amendment, the Court concludes that he is not entitled to habeas corpus relief. Because Petitioner has not been treated

differently as a result of a suspect classification, the assignment of jobs to inmates passes constitutional muster as long as it is reasonably related to some legitimate penological purpose. Templeman v. Gunter, 16 F.3d 367, 371 (10th Cir. 1994). As noted above, the assignment of jobs to inmates is wholly within the discretion of prison officials. See Oklahoma Stat. Ann. tit. 57, § 224 (West. Supp. 1994); see also Turnham, 1994 WL 413243, at *3.

B. Equal Protection Clause

Next Petitioner contends the 1988 amendments violate the Equal Protection Clause because they allow wide discretion in the assignment of credits by the DOC. Respondent answers that the provisions of the statutes are rationally related to a legitimate state interest.

The Court reviews Plaintiff's equal protection claim under the rational basis standard. Under this standard Plaintiff prevails only if (1) he is similarly situated with inmates who are treated differently by the DOC, and (2) the DOC has no rational basis for the dissimilar treatment. See Moreland v. United States, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 506 U.S. 1028 (1992); Buckley Const., Inc. v. Shawnee Civic & Cultural Development Authority, 933 F.2d 853 (10th Cir. 1991).

Although Plaintiff may be similarly situated, the Court finds that the state action at issue in this case "bears a rational relationship to a state objective not prohibited by the Constitution." More v. Farrier, 984 F.2d 269, 271 (8th Cir.),

cert. denied, 114 S.Ct. 74 (1993).

> Not all government-created inequalities are forbidden by the Constitution. 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'

Id. The Court cannot say that the DOC crossed that line in this case by allocating the award of credits upon conduct, performance, participation in work, personal hygiene, and maintenance of living area. The DOC is entitled to require that certain criteria be met in order for an inmate to progress to a higher credit level. Therefore, this case does not rise to the level of invidious discrimination proscribed by the Equal Protection Clause, see Briscoe v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"). The Court must defer to the judgment of the prison officials.

Therefore, Petitioner is not entitled to federal habeas relief on this ground.

III. CONCLUSION

The petition for a writ of habeas corpus is hereby **denied.** Petitioner's motions for appointment of counsel and for hearing (docket #2 and #3) are hereby **denied.**

IT IS SO ORDERED THIS 7 day of August 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BONNIE R. BREWER,
SS# 447-48-8392

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION

Defendant.

Case No. 95-C-877-J

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BONNIE R. BREWER,
SS# 447-48-8392

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION

Defendant.

Case No. 95-C-877-J

ORDER[1/]

Plaintiff, Bonnie R. Brewer, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts error because (1) the ALJ failed to fully develop the record, and (2) the testimony of the vocational expert did not support a finding of not disabled. For the reasons discussed below, the Court **reverses** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 8, 1943, and at the time of her hearing before the ALJ was 51. Plaintiff previously worked as a cutter at a photo school, as a puller in a

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[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[2/] Plaintiff filed an application for disability and supplemental security insurance benefits on April 29, 1993. [R. at 41]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge R.J. Payne (hereafter, "ALJ") was held July 31, 1994. [R. at 171]. By order dated October 7, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 18-27]. Plaintiff appealed the ALJ's decision to the Appeals Council. On February 14, 1995, the Appeals Council denied Plaintiff's request for review, and on August 7, 1995, the Appeals Council extended the time within which Plaintiff was permitted to appeal the decision of the Social Security Administration. [R. at 3, 10].

warehouse, and as a janitor. [R. at 76]. Plaintiff claims that she is no longer able to work due to asthma, back and leg pain, lack of strength in her arms and hands, immobility, and "nerves." [R. at 196].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[3/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

[3/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that although Plaintiff was unable to perform her past relevant work, she was capable of performing jobs in the national economy and was not disabled. The ALJ concluded that Plaintiff has severe degenerative disc disease, chronic obstructive pulmonary disease ("COPD"), had a 25% bilateral grip strength loss, and should be restricted from working around fumes, odors, dusts, gasses or chemicals. Based on the medical evidence, the testimony of the Plaintiff, and the testimony of the vocational expert, the ALJ decided that Plaintiff could work in the national economy and perform jobs such as: recreation attendant, hand packager, and advertising material distributor.

IV. REVIEW

FAILURE TO DEVELOP THE RECORD

EXTRANEOUS REPORT INCLUDED IN PLAINTIFF'S RECORD

Plaintiff initially asserts that the ALJ failed to develop the record properly because the ALJ partially relied on a report which was included in the record but

which did not pertain to Plaintiff. According to Plaintiff, an ALJ has a duty to develop the record; the Plaintiff's record contains an "Exhibit 12" *[r. at 95-100]* which is a record from Harriet L. McCutcheon (and not the Plaintiff); and consequently the ALJ's decision was based on a "polluted record."

Plaintiff's assertion that the record contains six pages of documents which relate to Harriet McCutcheon, and not Plaintiff, is correct. However, the inclusion of six pages of another claimant's documents does not automatically indicate that the ALJ's decision with respect to Plaintiff's disability was improper. As noted above, an ALJ's decision will be affirmed if it is based on substantial evidence. On review, the Court will exclude the six pages (which relate to a different claimant) in determining whether the ALJ's decision is supported by substantial evidence.

COMPLETION OF THE PRT FORM

Plaintiff asserts that the ALJ erred by completing the Psychiatric Review Technique Form ("PRT Form") without the assistance of a medical professional. Plaintiff argues that the ALJ failed to comply with the appropriate regulations because the ALJ completed the PRT Form rather than requesting that a mental health care professional complete the form.

In Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1049 (10th Cir. 1993), the court noted that the "record contained no evidence of claimant's mental impairment until shortly before the hearing with the ALJ, [and] none of the disability determinations prior to the ALJ's determination considered whether claimant's mental impairment rendered him disabled."

> Social security regulations specify that a special procedure must be followed when evaluating a mental impairment. Part of this procedure entails recording pertinent information on a standard document. When a claimant's severe mental impairment does not meet a listed mental impairment, the standard document must include an assessment of the residual functional capacity. The document must be completed at the "initial, reconsideration, administrative law judge hearing, and Appeals Council levels." At the initial and reconsideration levels, the document must be completed and signed by a medical consultant. The ALJ, however, may complete the document without the assistance of a medical advisor. When the issue of a mental impairment arises for the first time at the ALJ hearing level, the ALJ may choose to remand the case to the State agency for completion of the document and for a new disability determination.

Id. (emphasis added; citations omitted). The court in Andrade reversed the decision of the Commissioner, concluding that "when the record contains evidence of a mental impairment, the Secretary cannot determine that the claimant is not under a disability without first making every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." Id. at 1049.

Defendant is correct that the ALJ is not required, by the regulations, to have the assistance of a medical advisor in completing the PRT Form. 20 C.F.R. § 404.1520a(d). However, the statutes provide that "[a]n initial determination . . . that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary had made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable

residual functional capacity assessment." Bernal v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988).

Although one of Plaintiff's examining physicians indicated that Plaintiff suffered from depression and anxiety, the record contains only a PRT Form completed by the ALJ. Nothing indicates that the Secretary made an effort "to ensure that a qualified psychiatrist or psychologist . . . completed the medical portion of the case review and any applicable residual functional capacity assessment." Bernal, 851 F.2d at 301; Andrade, 985 F.2d at 1049. On remand, the Commissioner should comply with the statutes and regulations and use "every reasonable effort to ensure that a qualified psychiatrist or psychologist" completes the PRT.

FAILURE TO DEVELOP: MENTAL IMPAIRMENT

Plaintiff asserts that the ALJ erred because he failed to adequately develop evidence of Plaintiff's mental impairment.

The procedure for the evaluation of a mental impairment is explained in 20 C.F.R. 1520a. However, a claimant has the initial burden to establish the existence of a mental impairment.

> If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.

20 C.F.R. § 404.1508. See also 20 C.F.R. § 404.1528 ("*Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.")(emphasis in original).

The record contains very little evidence to support Plaintiff's claim of a mental impairment. Terrence M. Williams, D.O., examined Plaintiff at the request of Plaintiff's attorney on July 22, 1994. Dr. Williams noted that "in my opinion [Plaintiff] suffers from anxiety and depression from her chronic illnesses and the diseases. She shows to have a dysphoric mood with evidence of depressive symptomatology but also has findings consistent with anxiety and nervousness. She has been diagnosed as having a condition where [she believes] . . . that her illnesses are more significant than they appear on a physical basis." [R. at 165]. Dr. Williams is not a psychiatrist and he mentions no medical tests or documents to support his conclusion. In addition, no such documents are included in the record. Plaintiff noted on her medication list that she takes medication "for nerves." [R. at 158-59]. Plaintiff testified that sometimes her emotional stress could lead to an asthma attack. [R. at 199]. At the hearing, the ALJ asked Plaintiff to list all of her medical conditions which she believed prevented her from working. Plaintiff responded that her problems were "breathing, my asthma, my back and my leg [pain], and immobility, and my hands, not being able to hold onto things, and my losing my strength in my arms and hands, and my nerves." [R. at 197].

The ALJ noted that although Plaintiff's "consulting general practice physician was of the opinion that claimant has significant anxiety, depression, and a somatoform-like disorder, she has not been hospitalized or treated by a mental health expert at any time relevant herein." [R. at 20]. The ALJ additionally concluded that Plaintiff's "Xanax medication has been effective in controlling her mental disorders."[5/] The ALJ concluded that Plaintiff was not "severely limited" by her mental impairment.

Plaintiff's observation that an ALJ has a duty to develop the medical record is correct. See, e.g., Baca v. Dep't of Health & Human Servs., 5 F.3d 476, 479, 80 (10th Cir. 1993) ("Although a claimant has the burden of providing medical evidence proving disability, the ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues."). Plaintiff additionally relies upon Carter v. Chater, 73 F.3d 1019, 1021 (10th Cir. 1996). In Carter, the Tenth Circuit noted that

> [a]lthough her applications did not mention depression, the evidence Ms. Carter submitted to the ALJ included an evaluation by Dr. Baum, performed December 6, 1989, in which he diagnosed her as suffering from "depression and associated neuropsychiatric symptoms." The ALJ acknowledged in his decision that Ms. Carter had alleged a "disabling psychiatric condition" of depression. He rejected Dr. Baum's diagnosis, however, because it was "unsupported by any testing or even a clinical interview . . . . " The existence of Dr. Baum's diagnosis required the ALJ to develop the record concerning depression.

[5/] Defendant asserts that Plaintiff may have been prescribed Xanax because Plaintiff's breathing difficulties were triggered by stress and "it would thus be reasonable to conclude that Xanax was prescribed in conjunction with other medications to control the occurrence of breathing attacks." The record does not indicate why Xanax was prescribed for Plaintiff. Defendant's assertion may be reasonable, but such an interpretation should be left to the ALJ.

Id. at 1021-22 (citations omitted, footnote omitted). However, in Carter, the Tenth Circuit emphasized that although the claimant indicated that she had been treated for "job stress," and although Dr. Baum's report indicated she had been granted two weeks of disability as a result of the treatment, the ALJ did not request the records or reports of the claimant's treatment. The court concluded that by failing to request such reports or order a consultative exam, the ALJ had failed in his duty to fully develop the record. Id. at 1022.

The situation presented to the court in Carter is not present here. Nothing indicates that additional reports or records which would provide information as to Plaintiff's mental status exist but were not requested by the ALJ.

The record contains very little evidence to support Plaintiff's claim of a mental impairment. Only one consulting doctor noted that Plaintiff suffered from significant anxiety and depression. In addition, Plaintiff was prescribed medication to reduce her stress. The ALJ's main reason for discounting Dr. Williams' report is the lack of medical evidence to support it, and the lack of medical treatment sought by Plaintiff.[6/] Based on the record, the Court cannot conclude that the ALJ's determination is not supported by substantial evidence. However, the Court is reversing the ALJ's decision because the Commissioner did not make an effort to obtain qualified medical assistance in completing the PRT Form. Consequently, on remand, the ALJ should

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[6/] The ALJ notes the lack of hospitalizations or treatment by a mental health expert. [R. at 20].

reconsider Plaintiff's mental impairment, based on the information provided in the new PRT.

Question to Vocational Expert

Plaintiff asserts that the ALJ erred because he did not include, in his question to the vocational expert, a limitation for Plaintiff due to her depression, anxiety, and use of psychotropic medications. The ALJ included, in his second hypothetical question, the limitation that the jobs described by the vocational expert be "low-stress." [R. at 207].

An ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). On remand, the ALJ should determine Plaintiff's mental RFC (after giving due consideration to Plaintiff's records concerning her mental status and the mental evaluations), and present any limitations to the vocational expert.

The ALJ's Findings & Vocational Expert Testimony

Findings of the ALJ

Plaintiff asserts that the ALJ erred by finding that she could perform sedentary or light work because Plaintiff is unable to stand or sit for the requisite lengths of time. However, substantial evidence supports the ALJ's findings as to Plaintiff's physical RFC.[7/]

[7/] A Residual Functional Capacity Assessment, conducted on November 5, 1993, indicated Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand/walk for about six hours in an eight hour (continued...)

Plaintiff additionally alleges, without any elaboration, that the ALJ improperly evaluated her complaints of pain. The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). The record indicates that the ALJ correctly followed Luna in evaluating Plaintiff's complaints of pain.

Plaintiff also refers the Court to Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995). In Kepler, the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

> Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

> the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the

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7 / (. . . continued) day, and sit for about six hours in an eight hour day. [R. at 55-62]. Plaintiff indicated that she cooks some, visits with relatives or neighbors a few times each month, and drives her car approximately one time each week. [R. at 84]. Some of Plaintiff's medical tests indicated a "mixed result." [R. at 116] ("[I]t was equally obvious that the patient had a strong supratentorial component going from being short of breath in the chair during our conversation to a few minutes later not being short of breath. Also her respiratory efforts during the evaluation gave a similar mixed signal about her etiologies."). Plaintiff also testified that her daily activities included making her bed, vacuuming, doing dishes, making dinner, doing laundry, mopping (when she has to), sitting, and resting. [R. at 183-84].

> motivation of an relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Court concludes, after reviewing the reasoning of the ALJ, that the ALJ adequately complied with the mandates of Kepler.

QUESTIONS TO VOCATIONAL EXPERT

Plaintiff argues that the testimony of the vocational expert is contradictory and does not support a finding that Plaintiff is not disabled. Plaintiff asserts that the vocational expert initially testified that Plaintiff would be unable to perform her past relevant work, which was light work, but later testified that Plaintiff would, given the ALJ's hypothetical, be able to perform some types of light work (*e.g.* a recreation attendant). Plaintiff suggests that this testimony is contradictory and cannot support the ALJ's decision.

Plaintiff misconstrues the vocational expert's testimony. The vocational expert did testify that Plaintiff would be unable to do her past relevant work due to her decreased grip strength and the required bending and twisting. The vocational expert additionally noted that Plaintiff's past relevant jobs qualified as "light" work. However, the vocational expert did not testify that Plaintiff was unable to perform all light work. The ALJ properly consulted the expert in determining what type of "light" and "sedentary" work Plaintiff could perform given the additional restrictions imposed on Plaintiff by her RFC. See, e.g., Kelley v. Chater, 62 F.3d 335 (10th Cir. 1995).

Accordingly, the Secretary's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES L. GADDY,

Plaintiff,

vs. No. 96-C-434-K

ONEOK INC., a Delaware corporation, d/b/a OKLAHOMA NATURAL GAS COMPANY,

Defendant.

ORDER

Now before this Court is Plaintiff's Motion for remand. Plaintiff brought this action in the District Court of Tulsa County, Oklahoma, on April 25, 1996. Defendant, ONEOK Inc. d/b/a Oklahoma Natural Gas Company ("ONG"), filed a Notice of Removal in this Court on May 15, 1996. Defendant supports its removal of the case by arguing that Plaintiff's claim for denial of employment benefits is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1996), and that this Court therefore has original and exclusive jurisdiction. Plaintiff seeks remand, claiming that his Petition did not involve an ERISA claim, but only requested disability coverage and benefits as elements of his damages in his retaliatory discharge claim.

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I.

ERISA federally regulates employee benefit plans. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), expressly "supersedes any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. This preemption clause has been interpreted to be "deliberately expansive . . . to 'establish pension plan regulation as exclusively a federal concern.'" Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)). See also Rozzell v. Security Services, Inc., 38 F.3d 819, 821 (5th Cir. 1994).

This case requires this Court to decide whether § 1144 preempts any of Plaintiff's state law claims. Before preemption will be found, three requirements must be met. "There must be a state law, an employee benefit plan, and the state law must 'relate to' the employee benefit plan." National Elevator Indus., Inc. v. Calhoon, 957 F.2d 1555, 1557 (10th Cir.), cert. denied, 506 U.S. 953 (1992). There is no dispute here that all of the claims in Plaintiff's Petition are based on state law and that the ONG plan is an employee benefit plan under ERISA. The issue is whether one of Plaintiff's state law claims "relate[s] to" the ONG plan. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Thus, even if a state law is not specifically directed toward the

regulation of an ERISA plan or affects such a plan only indirectly, it can still be found to "relate to" a plan. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).

The Tenth Circuit has held that laws and common-law rules that provide remedies for misconduct growing out of the administration of an ERISA plan are preempted because they "relate to" ERISA plans. See Airparts Co. v. Custom Ben. Services of Austin, Inc., 28 F.3d 1062, 1064-65 (10th Cir. 1994). "What triggers ERISA preemption is . . . an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." Monarch Cement Co. v. Lone Star Indus., Inc., 982 F.2d 1448, 1452 (10th Cir.1992). In Monarch Cement, the Tenth Circuit explained, "[L]aws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA . . . or interfere with the calculation of benefits owed to an employee." Id. at 1452. The Tenth Circuit has given broad meaning to the phrase "relate to," "concluding common law tort and breach of contract claims brought by employees are preempted by ERISA 'if the factual basis of the cause of action involves an employee benefit plan.'" Monarch Cement, 982 F.2d at 1452 (citing Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir. 1991)). See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139-40 (1990) (wrongful discharge claim preempted because it required plaintiff to prove "that an ERISA plan exists and the

employer had a [benefit]-defeating motive in terminating the employment").

Inquiry therefore turns to the Plaintiff's original state court Petition to determine if any of Plaintiff's claims are preempted by ERISA. Plaintiff's Petition states in relevant part:

> IV.
>
> The discharge by the Defendant of the Plaintiff as an employee constitutes an unlawful retaliatory discharge and wrongful termination for which the Plaintiff has incurred significant damages including, but not limited to lost wages, future income and benefits, and emotional distress.
>
> V.
>
> The Defendant not only wrongfully discharged the Plaintiff, but thereafter, wrongfully terminated and conspired to terminate his long-term disability coverage, and the benefits that are due him, even though the job related injuries from which he became disabled occurred prior [*sic*] the Defendant's wrongful discharge of the Plaintiff.

The question here is whether the state law claim asserted in paragraph V seeks to redress actions somehow associated with Defendant's ERISA plan. Upon examination of the Petition, this Court holds this latter claim is preempted by ERISA. "[T]he existence of a[n] [ERISA] plan is a critical factor in establishing the [defendant's] liability" under this claim, see Ingersoll-Rand Co., 498 U.S. at 139-40, and "the factual basis of the cause of action involves an employee benefit plan," Settles, 927 F.2d at 509 (10th Cir. 1991). See also Ingersoll-Rand Co., 498 U.S. at 140

("Because the court's inquiry must be directed to the plan, this cause of action relates to an ERISA plan" and therefore is preempted).

Plaintiff contends that his Complaint mentions loss of benefits merely as an element in damages related to a claim for wrongful discharge, rather than an independent claim that denial of his benefits was illegal under state law. The Tenth Circuit has explained,

> [A]n employee may rely on state law to redress the breach of an employment contract, notwithstanding the presence of an ERISA plan, if the factual basis of the suit is independent of the rights and duties created by the plan. . . . [The Court's] preemption analysis turns, then, on the factual basis of plaintiff's state law claims, which [the Court] construe[s] with a strict focus on substance rather than form.

Wilcott v. Matlack, Inc., 64 F.3d 1458, 1462 (10th Cir. 1995) (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981)). See Rozzell v. Security Services, Inc., 38 F.3d 819 (5th Cir. 1994). While a claim that unlawful termination resulted in loss of benefits is not generally preempted by ERISA, where, as here, the plaintiff makes an *independent* claim for wrongful termination of benefits, such a claim is preempted by ERISA. In paragraph IV of his complaint, Plaintiff makes a claim for wrongful discharge. Then, in a separate paragraph, Plaintiff states, "*The Defendant not only wrongfully discharged the Plaintiff, but thereafter, wrongfully terminated and conspired to terminate his long-term disability coverage, and the benefits that are due him.*"

(Pet. ¶ V.) Plaintiff clearly drafted the Petition to include a separate and independent claim for wrongful termination of benefits. "This is not a case in which the loss of benefits is merely an element in damages related to a claim for wrongful discharge. [Plaintiff's] complaint expressly says that--independently of the wrongful discharge--his denial of benefits is illegal under state law." Burks v. Amerada Hess Corp. 8 F.3d 301, 305 (5th Cir. 1993). That Plaintiff's wrongful termination of employment claim and his wrongful termination of benefits claim are factually related, does not mean that the latter is an element of the former. The two are independent claims, and the latter is preempted.

II.

Now that the Court has determined that one of Plaintiff's claims is preempted by ERISA, the question is whether the state common law claim is also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B),[1] to the extent that the state court petition purporting to plead such a state common law cause of action is removable to federal court

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[1] Section 502(a)(1)(B) provides:
A civil action may be brought--
(1) by a participant or beneficiary--

. . . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

under 28 U.S.C. § 1441(a). See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60 (1987). By statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). One category of cases over which district courts have original jurisdiction are "federal question" cases; that is those cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metropolitan Life, 481 U.S. at 63. Federal pre-emption is ordinarily a federal defense to the plaintiff's suit, and as a defense, it does not appear on the face of a well-pleaded complaint, and, therefore does not authorize removal to federal court. See id. However, in Metropolitan Life, the Supreme Court carved out an exception to the well-pleaded complaint rule in cases involving claims preempted by ERISA § 502(a)(1)(B). The Court concluded that with respect to this section, Congress so completely preempted the field that any complaint raising a claim preempted by ERISA §502(a)(1)(B) is necessarily federal in character. See id. at 63-66. Accordingly, the Court held that common law causes of action filed in state court that are preempted by ERISA and come within the scope of § 502(a)(1)(B) are removable to federal court

under 28 U.S.C. § 1441(b). Id. at 66.

Plaintiff's claim that Defendant "wrongfully terminated and conspired to terminate his long-term disability coverage and the benefits that are due him" falls directly under the terms of § 502(a)(1)(B), which provides an exclusive federal cause of action for resolution of suits by beneficiaries to recover benefits from a covered plan. Therefore, Plaintiff's preempted claim is removable to federal court.

III.

Finally, as this Court has determined that Plaintiff's claim for wrongful termination of benefits was properly removed, this Court must determine whether to exercise supplemental jurisdiction over Plaintiff's remaining claims. Although the original state court Petition does not clearly enumerate and state Plaintiff's causes of action, this Court discerns the following causes of action from the face of the pleading: retaliatory discharge; wrongful denial/termination of benefits; and breach of contract (for Defendant's refusal to compensate Plaintiff under the "Ideas for Progress" program).

As provided by statute, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy

under Article III of the United States Constitution." 28 U.S.C. § 1367(a). See also United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (approving exercise of pendant jurisdiction when federal and state claims have a "common nucleus of operative fact" and would "ordinarily be expected to [be tried] all in one judicial proceeding"). However, a district court may decline to exercise supplemental jurisdiction over a claim if "the claim substantially predominates over the claim . . . over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). Upon examination of the Petition, this Court holds that Plaintiff's retaliatory discharge claim was his principal claim, and it substantially predominates over his denial of benefits claim (the claim over which this Court has original jurisdiction); therefore, this Court declines to exercise supplemental jurisdiction over the retaliatory discharge claim. In addition, since Plaintiff's contract claim (alleging Defendant's failure to compensate Plaintiff under the "Ideas for Progress" program) is not so related to the denial of benefits claim to form part of the same case or controversy, this Court holds that it does not have supplemental jurisdiction over the former contract claim.

IV.

Accordingly, Plaintiff's Motion for Remand (doc. #4) is GRANTED in part, and DENIED in part. This Court REMANDS to the state court Plaintiff's retaliatory discharge claim and his claim

for compensation under the "Ideas for Progress" program. This Court retains jurisdiction over Plaintiffs denial of benefits claim. Since Defendant's removal of the denial of benefits claim was not improper, Plaintiff's request for costs and attorney's fees is DENIED. The Clerk of the Court is DIRECTED to mail a certified copy of this Order to the Court Clerk for the District Court of Tulsa County, Oklahoma.

SO ORDERED THIS 8 DAY OF AUGUST, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN C. PRATHER,

Plaintiff,

vs.

THE STATE OF OKLAHOMA ex rel., DEPARTMENT OF HUMAN SERVICES,

Defendant.

No. 96-C-318-K

ENTERED ON DOCKET

DATE AUG 12 1996

O R D E R

Before the Court is the motion of the defendant to dismiss and to lift stay of proceedings. On April 22, 1996, plaintiff filed in this Court an "application to remove proceedings to the tribal court of the Osage Nation." Plaintiff is involved in a state court dispute over child custody payments and faces possible contempt proceedings.

By Order filed April 30, 1996, this Court temporarily stayed the state court proceedings and directed plaintiff to brief jurisdictional issues. Plaintiff has filed his brief, and as the Court's Order permitted, defendant filed a contemporaneous brief. Defendant filed the present motion on June 17, 1996 and plaintiff has responded.

The Court has reviewed plaintiff's submission and concludes, after construing his pro se pleadings liberally, he has failed to establish a basis for federal jurisdiction. To resolve disputes over child custody payments is traditionally a function of state courts. The fact that a party is a Native American does not establish federal jurisdiction. See Martinez v. Southern Ute

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Tribe, 273 F.2d 731, 734 (10th Cir.1960). Plaintiff has also failed to establish that the state court action implicates "Indian country" as defined in 18 U.S.C. §1151.

Contrary to plaintiff's assertion, diversity of citizenship is also unavailable to confer jurisdiction on this Court. The parties named in this proceeding are plaintiff, an Oklahoma resident, and the Oklahoma Department of Human Services. The fact plaintiff's ex-wife, who seeks enforcement of child support, is a resident of Kansas, is irrelevant.

Plaintiff also cites 28 U.S.C. §1343, which establishes federal jurisdiction over certain civil rights matters, but has utterly failed to make non-conclusory allegations which implicate that statute.

Finally, as the Court noted in its previous Order, plaintiff's initial pleading in this case actually asks this Court to "remove" the state court proceedings to the tribal court of the Osage Nation. This Court has no authority for such a transfer. Moreover, it is undisputed from documents in the record that plaintiff has made his own application to the tribal court of the Osage Nation, and that body has denied his request to assume jurisdiction over the state court proceedings.

It is the Order of the Court that the motion of the defendant to dismiss (#6) is hereby GRANTED. This action is dismissed and

the Court's order entered May 2, 1996, temporarily staying proceedings in JFD-82-20 in the District Court of Osage County is hereby vacated.

ORDERED this 8 day of August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. 94-CR-178-K
) 96C486K
ALLEN RAY BURKETT,)
)
Defendant.)

O R D E R

Before the Court is the motion of Defendant Burkett pursuant to 28 U.S.C. §2255. Defendant was charged by indictment with one violation of 18 U.S.C. §924(c). On April 25, 1995, Defendant pled guilty to Count I of the Indictment (18 U.S.C. §924(c)) and was sentenced to the mandatory sixty months. On May 30, 1996, Defendant filed the present motion, asserting his guilty plea should be vacated in light of Bailey v. United States, 116 S.Ct. 501 (1995). Bailey restricted the factual circumstances under which a §924(c) conviction is appropriate.

In response, the government requests that this Court affirm the conviction and sentence under 18 U.S.C. § 924(c), or, if the Court vacates the conviction and sentence, that this Court allow the government to reinstate the Indictment in this case and proceed to trial. The government also requests an evidentiary hearing if appropriate.

Since the record indicates that Defendant pled guilty pursuant to the pre-Bailey standard, an evidentiary hearing would not remedy the situation. Under similar circumstances, courts have permitted

reinstatement of the indictment. Cf. Fransaw v. Lynaugh, 810 F.2d 518, 524-525 (5th Cir.1987). A new seventy-day time limit is appropriate under 18 U.S.C. §3161(e) of the Speedy Trial Act.

It is the Order of the Court that the motion of the Defendant Allen Burkett pursuant to 28 U.S.C. §2255 is hereby GRANTED. The defendant's guilty plea, conviction and sentence are hereby VACATED. The Indictment in this case is reinstated. The Court Clerk's Office is directed to send notice of new motion deadlines, the pretrial date, and the trial date.

ORDERED this 8 day of ~~July~~ August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENVIROTEK FUEL SYSTEMS, INC.,

Plaintiff,

vs.

Case No. 95-C-654-K

JESSE J. WORTEN, III, d/b/a
JESSE J. WORTEN, III, INC. and
BREWER, WORTEN, ROBINETT,
JOHNSON, WORTEN & KING,

Defendants.

ENTERED ON DOCKET

DATE AUG 12 1996

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 8th day of Aug, 1996, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

s/ TERRY C. KERN

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN CRAIG BURNETT,

Plaintiff,

vs.

LEWIS HARRIS; JOHN SELPH; ROBERT DICK; STANLEY GLANZ; WILLIAM "BILL" THOMPSON; BRIAN EDWARDS; and RUSSELL LEWIS,

Defendants.

No. 95-CV-825-K

J U D G M E N T

This matter came before the Court for consideration of the motions for summary judgment by Defendants and that of Plaintiff. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

ORDERED THIS DAY OF 8 AUGUST, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN CRAIG BURNETT,

Plaintiff,

vs.

LEWIS HARRIS; JOHN SELPH; ROBERT DICK; STANLEY GLANZ; WILLIAM "BILL" THOMPSON; BRIAN EDWARDS; and RUSSELL LEWIS,

Defendants.

No. 95-CV-825-K

ORDER

Defendants' [Glanz, Thompson, Edwards, Selph, Dick, and Harris] motion to dismiss, or in the alternative, motion for summary judgment [Doc. #19] is now at issue before the Court. The Plaintiff has filed a response and a cross-motion for summary judgment [Doc. #24]. Defendant Lewis also filed a motion for summary judgment and objection to Plaintiff's summary judgment motion [Doc. #29]. For the reasons stated below, Defendants' motions for summary judgment should be granted.

I. BACKGROUND

In August 1995, Plaintiff, a pretrial detainee, brought this *pro se* civil rights action under 42 U.S.C. § 1983 against the Board of County Commissioners of the County of Tulsa [Harris, Selph, Dick], the Sheriff's Department of Tulsa County [Glanz, Thompson, Edwards and Lewis], alleging numerous violations of his constitutional rights while he was incarcerated at the Tulsa City County Jail ("TCCJ") from February 24, 1994 until May 6, 1994.

Plaintiff's complaint can be summarized as follows:

FIRST AMENDMENT VIOLATIONS: Denial of opportunity for religious services, denial of newspapers, radio and television, and denial of private telephone usage.

EIGHTH (FOURTEENTH) AMENDMENT VIOLATIONS:
Denied Reasonably Safe Environment: Plaintiff alleges a number of complaints centered around safety in the jail and Defendants' failure to protect him from violence including classification and placement of inmates, hostile attitude of personnel, and overuse of pepper gas.

Denied Exercise/Out-of-Cell Time: Plaintiff alleges he was denied adequate exercise or out of cell time both as a pretrial detainee and as an inmate. Plaintiff contends he was never allowed outside his cell from February 26, 1994 until May 6, 1994 except for 4 brief trips to court and 4 twenty minute weekend visits.

Denied Access to Courts: Plaintiff alleges he was denied legal materials, direct access to the law library, photocopying opportunity and no privacy of written notes.

Inadequate Medical and Mental Health Care: Plaintiff alleges Defendants failed to provide further psychiatric care, failed to provide adequate protection from spread of tuberculosis, failed to ascertain if medication was being taken, and failed to provide adequate medical treatment for high blood pressure, alcoholism, ingrown toenail, and deep vein thrombosis.

Inadequate Environmental and Health Conditions: The remainder of Plaintiff's allegations involve various conditions including sleeping on the floor, overcrowding, under staffing, bad food, poor ventilation, insufficient lighting, poor sanitation, inadequate plumbing, and insufficient clothing.

Plaintiff further alleges that all Defendants were acting under color of state law, that the Tulsa County Commissioners were responsible for reviewing, addressing and correcting any problems concerning the operation and management of the TCCJ, that Glanz as Sheriff was responsible for the actions of his employees at the county jail as well as overall management of daily operations. Plaintiff seeks compensatory damages. (Doc. #1.)

Defendants have moved to dismiss for failure to state a cause

of action pursuant to Federal Rule of Civil Procedure 12(b)(6) and to dismiss as frivolous pursuant to 28 U.S.C. § 1915(d). In the alternative, Defendants have sought summary judgment and attorneys fees under Federal Rule of Civil Procedure 56(b) on the basis of the Court-ordered Special Report [Doc. #16].[1] Defendant Lewis also seeks summary judgment [Doc. #29].

In his response to Defendants' motion, Plaintiff restates his initial complaints concerning the deliberate indifference of the Defendants during his incarceration and the "barbaric" conditions at the county jail.[2] Additionally, Plaintiff has moved for summary judgment based upon four exhibits and the Special Report, which Report he contends is sufficient to support his allegations despite its "several inaccurate statements."[3]

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[1] In answer to Plaintiff's *Complaint* Defendants have asserted the defense of qualified or "good faith" immunity. When this defense is raised, Plaintiff must show (1) that the Defendants' conduct violates the law as it now exists, and (2) that the law was clearly established at the time of the alleged unlawful conduct. Cummins v. Campbell, 44 F.3d 847, 850 (10th Cir. 1994). As set out more fully below the Court finds Defendants are entitled to qualified immunity because Defendants' conduct did not amount to a constitutional violation of clearly established law.

[2] While Plaintiff's response does not incorporate a sworn statement that all it contains is true, the Court finds it unnecessary to resolve the issue of whether this declaration is sufficient under 28 U.S.C. § 1746 because information contained in Plaintiff's response and exhibits is consistent with his original properly verified *Complaint* (Doc. #1). Moreover, it is possible for the Court to decide the issues without resorting to this subsequent information.

[3] Ex. 1 is the Notice of Findings, dated September 13, 1994, from Investigation of TCCJ by the U.S. Department of Justice, Civil Rights Division, which is attached to the *Complaint*; Ex. 2 is the sworn affidavit of Dean Sampson, which is filed as a separate document [Doc. #8]; Ex. 3 is the sworn

To the extent Plaintiff's *Complaint* and/or motions allege claims on behalf of all pretrial detainees and/or inmates, the Court has liberally construed Plaintiff's *Complaint* to allege only whether Defendants' actions or inactions violated Plaintiff's own civil rights. It is well established that one may not sue or recover damages for violations of another's civil rights under § 1983. See McGowan v. State of Maryland, 366 U.S. 420, 429 (1961); Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990).

II. UNDISPUTED FACTS

1. Plaintiff was incarcerated in the TCCJ from February 24, 1994, to May 6, 1994, where he was being held on charges of Count I, Murder in the First Degree; Count II, larceny of an automobile in case number CF 93-3131; and failure to appear/malicious injury to property in case number CF 93-2277. [Sp.Rpt. 1.]

2. Stanley Glanz is the duly elected and acting Sheriff of Tulsa County and has held that position since January 1, 1989. Defendants Harris, Selph, and Dick were duly elected Commissioners for Tulsa County, State of Oklahoma, at all times relevant to this case. Defendants Thompson and Edwards were employees of the Tulsa County Sheriff Department at all times relevant to this case.

3. Relevant to this matter, Russell Lewis served as the administrator of the medical facilities at the TCCJ.

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affidavit of Jerry Camblin, and Ex. 4 is a TCCJ Incident Report submitted by Plaintiff, both of which are filed as a separate pleading [Doc. #13]. [See Doc. #24, p. 23.] The Court need not address the sufficiency of these exhibits under Fed. R. Civ. P. 56(e) as Defendants are entitled to judgment as a matter of law.

4. Plaintiff was kept in a "high security" area of the TCCJ because he was charged with First Degree Murder, had fled the United States, and was considered a "high risk" escapee. [Sp.Rpt. 3.]

5. Following a four-hour stay in TPD-27, the city holding cell with no bunks, Plaintiff was transferred to TPD-16, issued a blanket and mattress, and spent 58 hours in this cell; then, Plaintiff was transferred to cell B-1-8, a two-man, two-bunk cell on the 8th floor, in which either violent or potentially suicidal prisoners are placed and where he stayed for approximately 16 days; lastly, he was transferred to cell C-1-8, where he remained for 52 days. The total number of days incarcerated was 75. [Sp.Rpt. 1, 3-5, 11.]

6. On April 6, 1994, Plaintiff was notified of a death in his family while he was located in cell C-1-8. [Sp.Rpt. p. 6.]

7. There were jail operating procedures in effect at the time of Plaintiff's incarceration at the Tulsa City-County Jail. [Sp.Rpt. Ex. C, H, J, K, L, Q, and W.]

8. The Tulsa County Board of County Commissioners and The Tulsa Metropolitan Board of Directors entered into a written contract to afford religious opportunities for TCCJ inmates. This contract has been in force from August 29, 1990 and was in force during the incarceration of Plaintiff. [Sp.Rpt. 7.]

9. There were two reported incidents of violence that occurred in Plaintiff's cell: March 30, 1994 and April 14, 1994. There were an additional 8 other incidents of violence that

occurred on the 8th Floor but in other cells. [Sp.Rpt. 6.]

10. On March 30, 1994, an incident in C-1-8 occurred involving Steven K. Millikin. [Sp.Rpt. 6, Ex. F.]

11. Inmate Grievance and Request Forms were available during the time of Plaintiff's incarceration. Plaintiff filed two grievances: April 14 and 19, 1994. [Sp.Rpt. 7, Ex. G.]

12. Plaintiff was not eligible for out-of-cell exercise according to the TCCJ procedure for Inmate Recreation and Exercise Program, JOM 034. [Sp.Rpt. 11; Ex. L.]

13. During Plaintiff's initial court appearance on February 25, 1994, and until March 3, 1994, he was represented by attorney Larry Shiles. On March 4, 1994, the Court appointed David Iski, Public Defender, as counsel of record. [Sp.Rpt. at 14.]

14. Five requests for legal materials from Plaintiff are documented during his incarceration: March 12, March 23, March 26, March 31, and April 8, 1994. [Sp.Rpt. 13, Ex. P.]

15. The law librarian attested to filling legal material requests for Plaintiff, although she did not deliver the materials. The detention officer is responsible for delivery. Inmates are not permitted to go outside the TCCJ to seek legal materials, nor are they permitted to browse the law library. [Sp.Rpt. at 13-14, Ex. P.]

16. The Tulsa County Detention Division does not supply a phone book for inmates. Phone calls which are not collect are afforded to inmates at certain stages of confinement: upon arrest, change of status, and bond modification. All other calls are

collect to the outside. [Sp.Rpt. 14.]

17. Plaintiff's medical intake history listed deep vein thrombosis of both feet for which he was taking Motrin 800 mg, 3x daily; indicated no mental health problems, no suicide attempts, and approval for general prison population. [Sp.Rpt. Ex. A.]

18. During his incarceration, Plaintiff submitted 5 inmate health service requests on the following dates in 1994: March 1, March 8, March 17, March 27, and April 10. [Sp.Rpt. 16; Ex. A.]

19. Following a psychiatric evaluation on April 5, 1994, Plaintiff was prescribed and received Doxepin, 50 mg. for 3 nights, which was increased to 100 mg. for 90 days. [Sp.Rpt. Ex. A.]

20. Plaintiff was given a PPD skin test for tuberculosis on March 29, 1994, with negative results. [Sp.Rpt. 18.]

21. There was an electrical fire in the ventilation system on the 9th Floor on February 25, 1994, resulting in an evacuation of the inmates to the city jail. [Sp.Rpt. Ex. U.]

22. Pepper gas was used to restore order when two rival gang members started fighting after evacuating TCCJ because of a fire. There is no evidence that handcuffed prisoners were beaten. Some of the residual effect of pepper gas may have come into contact with innocent inmates nearby. [Sp.Rpt. 20.]

23. Trash receptacles are available in the "big cells" and trash sacks in the "small cells," but it is not uncommon for trash to be on the floors and catwalks. It is the responsibility of the inmates to keep their cells and the structures clean. [Sp.Rpt. 21-22; Ex. W.]

24. The meals are prepared by inmate workers under the supervision of a kitchen supervisor. The meals are placed on trays by inmate workers who are to shower and change clothes each day. The preparers are to wear hair nets and gloves, and the meals are placed in the cells by a detention officer who wears gloves. [Sp.Rpt. 22; Ex. W.]

25. Plaintiff was incarcerated during the time in which the laundry machines were being moved and re-established at the Adult Detention Center (ADC). This move caused a temporary lag in laundry service. Washing clothes in mop buckets was common during this period and still occurs. [Sp.Rpt. 22.]

26. According to TCCJ procedure JOM 021 and JOM 017, inmates are denied the possession of newspapers, clocks, watches and other items not listed as approved personal property and such items are removed as contraband. However, inmates are allowed magazines and calendars. The Tulsa County Library distributes books and magazines periodically through the jail. [Sp.Rpt. 9-10; Ex. J, K.]

27. No jail television program was in effect during the period Plaintiff was incarcerated. Radios are not listed as permissible personal property under the Jail Operating Procedures, JOM#017. [Sp.Rpt. 10; Ex. K.]

III. ANALYSIS

A. Dismissal as frivolous under 28 U.S.C. § 1915(d)

Defendants have raised frivolousness as a basis for dismissal. "The term 'frivolous' refers to 'the inarguable legal conclusion'

and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(d). Id.

It is well established that prisoners do not lose all constitutional rights once incarcerated. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Courts have also recognized that those rights may be restricted if reasonably related to a legitimate penological interest. See e.g. Thornburgh v. Abbott, 490 U.S. 401 (1989); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

Having liberally construed Plaintiff's *pro se* pleadings, the Court concludes that Plaintiff's First Amendment claims that he was denied religious services as well as a radio and television lack an arguable basis in law. These claims contain no more than conclusory, unsupported allegations. "Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). Accordingly, these two First Amendment claims are dismissed without prejudice.

B. **Summary Judgment**

1. **Standard**

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). However, the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. Hall, 935 F.2d 1106, 1111.

Where a *pro se* plaintiff is a prisoner, a court authorized "*Martinez* Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See id. at 1109. The court may treat the *Martinez* Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. Analysis of Plaintiff's Individual Claims

Plaintiff's allegations focus on the conditions of confinement at the TCCJ. It is well to remember that while the Constitution prohibits "inhumane ones," it "does not mandate comfortable prisons." Farmer v. Brennan, 114 S.Ct. 1970, 1976 (1994). In order to establish that a prisoner's conditions of confinement violate the Eighth Amendment, the prisoner must show that (1) the alleged deprivation is, "objectively, sufficiently serious," resulting "in the denial of the minimal civilized measure of life's necessities," and (2) that the prison officials were deliberately indifferent to "an excessive risk to inmate health or safety," meaning that the officials actually knew of and disregarded the risk. Id. at 114 S.Ct. at 1977, 1979. Absent a showing that the prison officials consciously understood that the prison conditions created such an excessive risk, the conditions are not a "punishment" within the meaning of the Eighth Amendment. Id. at 114 S.Ct. 1979.

Furthermore, Plaintiff has the burden of establishing a constitutional minimum of standing by showing that he suffered injury-in-fact, that the injury is fairly traceable to Defendants' allegedly unlawful conduct, and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Clajon Production Corporation, et al v. Petera, et al, 70 F.3d 1566, 1571 (10th Cir. 1995). The Court is aware that Plaintiff has not alleged any physical injury, that is, an injury-in-fact during his incarceration at the TCCJ.

(a) First Amendment Violation:

Plaintiff contends that "inmates were not allowed to possess newspapers, magazines, clocks, watches, calendars or virtually anything." [Doc. #1 at 7.] With the exception of magazines and calendars, the Special Report confirms that newspapers, clocks, and watches are prohibited by regulation. Books and duplicate copies of periodicals such as *Field & Stream, Newsweek, and Car & Driver*, are distributed by the Tulsa County Library [Doc.#16 at 9-10, Ex. G]. It is apparent Plaintiff had access to this library distribution because he filed a grievance when some books were removed from his cell. See Sp.Rpt. at Ex. G. There is no evidence that Defendants nor any of their staff ever refused to deliver to Plaintiff any magazines or books sent to him through the mail or otherwise. On January 26, 1995, over eight months after Plaintiff's detention, the TCCJ implemented a policy in response to McMahon v. Glanz, 94-C-1198-K, permitting inmates to receive, at their own expense, books, magazine, and papers through the mail from legitimate publishers and bookstores.

Additionally, it is undisputed that Plaintiff received notification of his father's death on April 6, 1994, while Plaintiff was incarcerated at TCCJ. It is also undisputed that Plaintiff was kept in a high-security area. And while Defendants did not permit Plaintiff to leave his cell to make a private telephone call to his family, there is no evidence that Plaintiff was denied usage of a telephone within the cell. Nor is there any evidence that Plaintiff was prejudiced by not being allowed to use

a telephone outside of his cell in the maximum security area.

As stated previously, the question of harm or "injury in fact" is a preliminary inquiry in every case or controversy filed in federal court. Standing to sue is premised upon a personalized injury to a legally cognizable interest of the plaintiff. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218 (1974). Plaintiff has not shown that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendants, nor has he met any of the other elements required to make such a showing. Clajon, 70 F.3d at 1571. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's First Amendment claims.

(b) Eight (Fourteenth) Amendment Violations:

(i) Denied Reasonably Safe Environment--

Pretrial detainees and inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). An official is deliberately indifferent if he "knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to

abate it." Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994).

Plaintiff asserts a number of conditions which violate his interest in personal safety. He contends Defendants failed to protect him from violence because of the classification and placement of inmates, understaffing of jail personnel, faulty construction of the jail facility which prohibits viewing into the cells, openly hostile attitude of the deputies, overuse of pepper gas on innocent inmates, and other conditions which place the lives of detainees in constant danger. Plaintiff states he was "physically struck four times" [Doc. #1 at 6-7], threatened while in cellblock C-1-8 as well as having some personal items stolen [Doc. #24 at 5, Doc. #16, Ex. G]. Plaintiff did not request medical treatment following any of these events. Defendants admit that Plaintiff was housed in a high-security cell with other potentially violent or suicidal prisoners, that fights do occur between inmates but Defendants maintain that the jail meets minimum standards for rounds and staffing. (Doc. #16 at 5-6, Ex. E, I, U.)

Correction facilities are, by their very nature, dangerous places and officials need not anticipate every risk which arises in the facility. Where a risk is obvious or known to exist, officials must act reasonably to protect the personal safety of detainees. The mere fact that Plaintiff as a pretrial detainee was housed in the same cell as convicted inmates does not indicate that there was an intent to punish. "Classification of inmates whether or not desirable is not a constitutional requirement." See Martin v. Tyson, 845 F.2d 1451, 1456 (7th Cir. 1988) (per curiam), cert.

denied, 488 U.S. 863 (1988). From a review of the Sheriff's log as stated in the Special Report, it is apparent that Defendants removed "troublemakers" from Plaintiff's cell, relocated such individuals, and conducted searches and shakedowns as necessary. [Sp.Rpt., Ex. D at 147, 164, 168, 202.] Moreover, Plaintiff has failed to show that he was injured as a result of his cell placement, or by the overspray from use of pepper gas on other inmates, or that jail personnel acted with reckless disregard for his safety. Id. (placement of pretrial detainee in county jail with convicted inmates was not unconstitutional absent any evidence that inmate had been injured by cell placement); see also Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988)(to be entitled to judgment on a failure to protect claim, a plaintiff must show a causal relationship between his or her injury and the deliberate actions of the defendant prison official).

While Plaintiff argues prison officials knew the pepper gas would travel through the air and air vents affecting other inmates with its use, the Court finds that Plaintiff fails to establish "wanton or deliberate infliction of injury" on bystanders such as Plaintiff. Again, the Court finds that there remain no genuine issues of material fact that Plaintiff suffered any injury as a result of these alleged violations. Plaintiff made no request for medical care following any of the incidents and simple discomfort does not amount to a constitutional violation. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's denial of safety claim.

(ii) Denied Exercise/Out-of-Cell Time--

Plaintiff alleges he was denied adequate exercise or out-of-cell time both as a pretrial detainee and as an inmate. He contends he was never allowed outside his cell from February 26 until May 6, 1994, except for 4 brief trips to court and 4 twenty-minute weekend visits.

The Court concludes that Defendant's policy of prohibiting high-escape risk inmates, such as Plaintiff, from participating in the county jail's exercise program is reasonably related to a legitimate penological interest and does not violate Plaintiff's due process rights. See Martin, 845 F.2d at 1457 (denial of outdoors exercise was related to legitimate prison concern in security, based on escape charge pending against detainee, and thus was not a constitutional deprivation). In Clayton v. Thurman, No. 79-C-723-B, this Court approved as constitutional an exercise program in which inmates incarcerated for more than thirty days would be eligible to participate in the exercise program *unless* the inmate was classified as an escape risk or had his/her exercise rights suspended. It is undisputed that Plaintiff was classified as an escape risk and, therefore, his eligibility to participate in the exercise program was dependent upon a legitimate penological interest. The Court finds there remains no genuine issue of material fact that Plaintiff did not suffer any injury as a result of inadequate exercise or out-of-cell time nor does it amount to a constitutional violation. Furthermore, Plaintiff has not established that Defendants intended harm.

(iii) Denied Access to the Courts and the Law Library--

A pretrial detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. Petrick v. Maynard, 11 F.3d 991, 994 (10th Cir. 1993) (quoting Bounds v. Smith, 430 U.S. 817, 822 (1977). The Tenth Circuit has extended this constitutional right recognized in Bounds to include county jails. Housley v. Dodson, 41 F.3d 597, 598 (10th Cir. 1994).

Plaintiff alleges he submitted over ten requests for legal materials but "never received any." He alleges he had no direct access to a law library or any printed legal material, his verbal requests were ignored, had no telephone directory, had no opportunity to personally photocopy legal materials, and had no privacy of written notes. [Doc. #1 at C(2).]

On the basis of the Special Report, a total of 5 written requests were logged as submitted by Plaintiff, and according to the affidavit of the law librarian, these requests were filled. However, the delivery of the materials is the responsibility of the detention officers, and it is unclear whether Plaintiff actually received the requested materials [Sp.Rpt. at 13, see Ex. P].

It is undisputed that at the initial criminal hearing, Plaintiff was represented by counsel, who was allowed to withdraw on March 3rd. On March 4, 1994, the office of the Public Defender was appointed to represent Plaintiff. Plaintiff argues that since he did not have access to telephone directories, he "had no choice but to use a public defender." [Doc. #24 at 8.] Telephone

directories are not provided by TCCJ because in the past inmates have destroyed them, and as a result, requests for telephone numbers are handled through the Inmate Request and Grievance form [Sp.Rpt. at 14]. There is no evidence that Plaintiff submitted any "telephone number" request, nor is there any evidence that Defendants refused to comply with such a request. Likewise, there is no evidence Plaintiff made any request for photocopying. Although inmates do not have direct access to a photocopier, there is no evidence that Defendants refused to photocopy legal materials, if any, were requested by Plaintiff. On the contrary, according to the Special Report, the law librarian "makes perhaps hundreds of copies of legal cases a week for inmates seeking information on legal issues" and especially if an inmate files a suit *pro se* [Sp.Rpt. at 15].

The Court concludes that Plaintiff has not demonstrated a violation of his constitutional right of access to the courts and the law library. While it is undisputed that Plaintiff did not have physical access to the law library, Plaintiff has not shown that Defendants in any significant way restricted access to his counsel to prepare a defense in his criminal case, restricted his access to the telephone for communications with his counsel, or restricted his ability to communicate privately with his attorney. Although Plaintiff was not physically allowed to browse the law library, he did have alternative legal representation and access to the courts through his court-appointed attorney, albeit "no choice" of his. See Ruark v. Solano, 928 F.2d 947, 950 (10th Cir.

1991) (a prisoner's constitutional right of access to the courts is not conditioned on the showing of need, but on the absence of alternative legal resources); Love v. Summit County, 776 F.2d 908, 912, 914-915 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986) (prisoner was not denied access to the law library because he had access to counsel to pursue his civil rights claims at all times during his incarceration and had access to telephone and free postage). Furthermore, even if the Defendants' conduct could be construed as significantly interfering with Plaintiff's access to the courts, it does not appear to the Court that Plaintiff, whose listed occupation is court reporting, has been prejudiced in pursuing his litigation. See Tref v. Galetka, 74 F.3d 191, 194 (10th Cir. 1996). Plaintiff argues that, if he had been given access to legal materials, he would have been able to "research his own case to assist in his legal defense." [Doc. #24 at 8.] Even liberally construing Plaintiff's assertions, the Court concludes Plaintiff cannot establish prejudice as a result of the alleged denial to the law library. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of denial of physical access to the courts and the law library.

(iv) Inadequate Medical and Mental Health Care--

The government is obligated to provide medical care for those lawfully incarcerated. Estelle v. Gamble, 429 U.S. 97 (1976). Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth

Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate-medical-treatment claim must be judged against the deliberate indifference to serious medical needs test set out in Estelle. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S.Ct. 2321, 2324 (1991).

Plaintiff asserts that Defendants, including Defendant Lewis, ignored his medical history of psychiatric care and placed him in general population, did not permit him to see his own psychiatrist, intentionally placed him in a two-man cell with a convicted killer to influence an "insanity defense or...plea bargain," exposed him to active tuberculosis causing him "considerable emotional distress," and failed to monitor whether he took his medication or saved it for suicide attempts. Plaintiff also asserts he "was never examined by an M.D." while at the TCCJ. [*Complaint* at 8-10.]

Defendant Lewis argues to the contrary that Plaintiff was initially examined by the TCCJ medical staff the day he was booked in the TCCJ as supported by Exhibit A to the Special Report as well as Defendant's Affidavit [Doc. #30, Ex. A]. A review of this exhibit indicates that Plaintiff (1) answered "no" as to any medical problems the TCCJ should know about, (2) stated he had history of deep vein thrombosis in both feet for which Motrin 800 mg was prescribed, (3) stated he had no history of suicide or

psychiatric hospitalization, and (5) listed no mental health problems. This initial medical screening was completed by a registered nurse and reviewed by A.T. Cox, M.D. [Sp.Rpt., Ex. A.] On the basis of the above information, Plaintiff was approved for general population housing.

Five requests for health services were documented in Plaintiff's file in 1994: March 1, March 8, March 17, March 27, and April 10. On March 1, Plaintiff complained of a runny nose, watering eyes, deep vein thrombosis in both feet and pain in right foot. An attempt to see Plaintiff was made on March 4, when the request was received by the TCCJ medical staff. However, Plaintiff was in court and was not seen. [Sp.Rpt. at 16 and Ex. A; Doc.#30 at 3 and Ex. A, Aff. of Russell Lewis.] The March 8 request was received by the medical staff on March 9, and Plaintiff was examined by a nurse who noted that both of Plaintiff's feet were discolored but not swollen, and that he appeared to be depressed and requested to be seen by a doctor. Approximately one week later, Plaintiff requested medication and to be seen by a doctor.

Three days later, on March 20, Plaintiff was seen by Dr. Cox who recorded a diagnosis of chronic stasis-dermatitis-type discoloration of both sides of Plaintiff's feet, some swelling of the right foot but good post tibial pulses and no tenderness or swelling of the calves. Plaintiff was ordered to continue receiving ibuprofen, to elevate his feet, and to be seen by a TCCJ psychiatrist. On March 27, Plaintiff again requested an anti-depressant and an appointment with a psychiatrist. On March 29,

1994, Plaintiff was given a tuberculosis skin test, which tested negative on March 31.

On April 5, 1994, Plaintiff was seen by a mental health social worker at the TCCJ, who made a provisional diagnosis of major depression and referred Plaintiff to Dr. Trombka, a TCCJ psychiatrist, for a mental evaluation. The mental health worker noted Plaintiff "has no actual plans but thinks about suicide from time to time." [Sp.Rpt. at Ex. A; Doc. #30, Ex. B at 2.] Later that same day [April 5, 1994] Plaintiff was seen by Dr. Trombka who noted Plaintiff's history and medication for treatment of recurrent depression dating back to 1990. (This was the first documentation of Plaintiff's prior treatment for depression.) Dr. Trombka prescribed Doxepin, 50 mg for 3 nights, and thereafter, Doxepin 100 mg for 90 days.

Five days later, on April 10, 1994, Plaintiff requested Motrin for pain from deep vein thrombosis and also elastic socks. This request was referred to the Director of Nursing at the TCCJ. There is no indication in the record whether this request was resolved.

According to the medication administration record, Plaintiff was given the following: Motrin 800 mg - February 25, 1994 through March 15, 1994; Doxepin 50 mg - April 5, 1994 through April 7, 1994; Doxepin 100 mg - April 8, 1994 through May 6, 1994 (Plaintiff's last day at TCCJ).

--Deep vein thrombosis: The medical records contained in the Special Report and the Affidavit of Defendant Lewis refute

Plaintiff's statement that he was "never examined by an M.D." Taking as true Plaintiff's allegation that he was never examined by an M.D., there is still no constitutional right to be examined only by an M.D. And while it may be true that an "M.D." did not examine Plaintiff, Plaintiff does admit he complained of his feet/leg condition to the "nurse who visited his cell on three occasions...." [Doc. #24 at 10.] Furthermore, the record indicates that Plaintiff was seen by medical personnel qualified to diagnose and treat his illness or condition and was prescribed appropriate medication during his incarceration. Plaintiff's allegations at best amount to mere negligence in the manner of treatment for his medical conditions, and as such may be medical malpractice redressable in state court, but does not represent cruel and unusual punishment. Estelle, 97 S.Ct. at 291-292.

--Depression/Suicide: Likewise, Plaintiff's allegations of inadequate treatment for depression/suicide fail to meet the requisite standard. There is no evidence that Plaintiff displayed clear signs of suicidal tendencies, no evidence that any jail personnel had actual knowledge of, or were willfully blind to, the significant risk that Plaintiff would commit suicide, or that Defendants failed to take obvious steps to address that risk. See Bowen v. City of Manchester, 966 F.2d 13, 16-17 (1st Cir. 1992). To the contrary as stated previously, there was no history of suicide or psychiatric hospitalization, nor any mental health problems listed by Plaintiff on the initial medical screening. It was not until March 27, 1994 that Plaintiff revealed he had a

history of depression and had been hospitalized for "suicide watch in 1990." [Doc. #30, Ex. B at 4.] Even at that time, Plaintiff had displayed no clear signs of suicidal tendencies. In order to create a genuine issue for trial, Plaintiff must show evidence concerning an inference of knowledge of the risk of his suicide. Furthermore, Plaintiff's argument that he was not allowed to see his own psychiatrist is not a constitutional violation. The Eighth Amendment does not guarantee a prisoner's choice of physician. See Jackson v. Fair, 846 F.2d 811, 817 (1st Cir. 1988).

Tuberculosis: Plaintiff does not challenge the adequacy of the medical treatment which he received in testing for tuberculosis. Rather he contends that Defendants deliberately exposed him to at least one inmate with active tuberculosis during his incarceration. Although unreasonable exposure to a serious, communicable disease, such as tuberculosis, is actionable under the Eighth Amendment, "an unsubstantiated fear of contracting a serious disease," cannot be the "basis for a constitutional claim." Quarles v. DeLa Cuesta, 1993 WL 86460, at *1 (E.D.Pa. March 23, 1993) (unpublished opinion) (collection of cases) (undisputed medical evidence established that on the date plaintiff was ordered back to his cell, his cell mate did not have active tuberculosis and had already begun taking the antibiotic Isoniazid to prevent his infection from becoming active). To establish unreasonable exposure to tuberculosis under the Eighth Amendment, Plaintiff must establish that Defendants, in fact, were aware that his incarceration subjected him to an excessive or substantial risk of

contracting tuberculosis and that, nevertheless, they failed to act on that knowledge in violation of Plaintiff's constitutional rights. See Helling v. McKinney, 113 S.Ct. 2475, 2480 (1993),

Assuming an inmate in cellblock C-1-8 was infected with active tuberculosis during the time Plaintiff was in the TCCJ, there is no evidence that Defendants knew of the condition and failed to act on that knowledge. Quite to the contrary, Defendant Lewis attests that the TCCJ was notified on March 25, 1994 that one inmate had active TB, and that same day, removed the infected inmate from the prison population. [Doc. #30 at 6; Ex. A at 3.] In Wright v. Baker, 849 F.Supp. 659, 757 and n.15 (N.D.Ohio 1994), the court held that, even if the inmate had tested positive for exposure to tuberculosis, he could not establish that prison officials knew that an inmate had active tuberculosis and failed to act on that knowledge. The undisputed evidence in Wright showed that the infected inmate was not diagnosed with active tuberculosis until after he had left the prison, and, once diagnosed, he was not returned to the facility. Id.

In the instant case, the undisputed evidence reveals that the one inmate held at TCCJ with active tuberculosis was removed from the jail, hospitalized, treated, and not returned to the TCCJ until it was determined that he was no longer contagious. [Doc. #30 at 6; Aff. of Russell Lewis.] Additionally, Plaintiff, along with 167 other inmates and TCCJ employees, were administered tuberculin tests. Plaintiff's test results were negative. Of the 167 tested, twenty-four individuals were identified for further screening

including chest x-rays, which was done. However, no positive tuberculosis skin test resulted, and no medication was necessary or administered. [Doc. #30, Ex. A at 3.] Accordingly, "[t]he fact that [Plaintiff] might have been exposed to an inmate who was later discovered to have active tuberculosis [will] not [be] enough to show an Eighth Amendment claim." Id.

Therefore, the Court concludes there remain no genuine issues of material fact concerning Plaintiff's claim for inadequate medical and mental care. Furthermore, pursuant to the Prison Litigation Reform Act, federal civil actions by prisoners for mental or emotional injury suffered while in custody are barred without a prior showing of physical injury. See Prison Litigation Reform Act, Sec. 803, (d) Suits by Prisoners - Sec. 7 of the Act(42 U.S.C. 1997(e))as amended April 26, 1996. Accordingly, Defendants are entitled to judgment as a matter of law on this inadequate medical treatment claim.

(v) **Inadequate Environmental Health and Safety Conditions:** Lastly, Plaintiff complains about (1) inadequate ventilation or air conditioning; (2) unsanitary and overcrowded cells; (3) bad food and unsanitary handling of food; (4) insufficient lighting and inadequate plumbing; (5) having to sleep on the floor, and (6) denial of a change of uniform for 31 days. [Doc. #1 at 12.]

Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. Consequently, some level of discomfort is inherent in any incarceration, and as long as that discomfort does not amount to

punishment it does not violate a detainee's constitutional rights. None of Plaintiff's complained of conditions, either alone or in totality, amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Plaintiff has failed to show that the crowded condition at the TCCJ caused him any physical injury. See 18 U.S.C. §3626(a)(1). It is most likely that the ventilation system was damaged during the fire which occurred on February 25, 1994, but there is no evidence that Plaintiff was injured or that the Defendants' actions were deliberate to cause Plaintiff harm. The mere fact that during part of his incarceration Plaintiff was forced to sleep on a mattress on the floor does not amount to punishment. The Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed, absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D.Tex. 1988). Moreover, incarceration in a cell which smelled of urine and had some cockroaches did not amount to punishment. See McBride v. Illinois Dept. of Corrections, 677 F.Supp. 537, 539 (N.D.Ill. 1987); Bradford v. Gardner, 578 F.Supp. 382 (E.D.Tenn. 1984) (had no constitutional right to be incarcerated in a cell which does not smell of urine). Plaintiff has not shown that he was harmed as a result of wearing the same clothing for 31 days. See Young v. Ballis, 762 F.Supp. 823, 831 (S.D.Ind. 1990). Justifiably, Defendants have argued that not only was the TCCJ operating at full capacity, but during this same time frame, the laundry facilities

were relocated to the Adult Detention Center approximately two miles away. Defendants admit that inmates were allowed and often observed them washing their clothes in the mop buckets during this period. See Sp. Rpt. at 22-23; Doc. #20 at 8.

Likewise, Plaintiff's allegations of sharing "toilets, sinks and showers" that were never cleaned, basic toiletry and hygiene items that were often not supplied, "mold growth, roaches, leaking pipes and overflowing drains," bad food or improper handling of food, and trash on the floor and catwalks do not amount to a constitutional violation. The Constitution "does not mandate comfortable prisons," and as long as inmates are provided "the minimal civilized measure of life's necessities," the jail conditions will not become the basis of a constitutional violation. Rhodes v. Chapman, 452 U.S. 337, 347-49 (1981). In any event, Plaintiff has failed to show that Defendants intentionally deprived him of a constitutional right. See Daniels v. Williams, 474 U.S. 327 (1986) (in order to establish a claim under section 1983, Plaintiff must show that intentional actions of the defendants served to deprive him of a constitutional right).

Therefore, the Court finds that there remains no genuine issue of material fact as to Plaintiff's general conditions of confinement claims and Defendants are entitled to judgment as a matter of law.

3. Individual Liability

In the alternative the Court notes that Plaintiff has failed

to establish an affirmative link between the alleged constitutional violations and Defendants' conduct. In the context of civil rights claims against government officials, a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988).

Defendant Lewis attests that he never personally rendered any care or treatment to Plaintiff Stephen Craig Burnett during his incarceration at TCCJ. Therefore, Defendant Lewis is entitled to judgment as a matter of law on any claims which Plaintiff has alleged against him in his individual capacity.

Furthermore, the Court holds that the County Commissioners, Harris, Selph, and Dick cannot be held individually liable. "Under Oklahoma law, the Board has no statutory duty to hire, train, supervise or discipline the county sheriff or their deputies." Meade, 841 F.2d at 1528 (citing Okla. Opin. Atty. Gen. No. 79-98, at 14 (May 15, 1979)). "Consequently, unless the Commissioners voluntarily undertook responsibility for hiring or supervising county law enforcement officers, which is not alleged, they were not 'affirmatively linked' with the alleged" constitutional violations. Id.

Likewise, Plaintiff has failed to allege an "affirmative link" sufficient to establish liability as to Sheriff Glanz, Deputies

Thompson or Edwards. Id. While it is true that under Oklahoma law a sheriff is responsible for the proper management of the jail and for the conduct and training of his deputies, a sheriff will not be held personally responsible under § 1983 unless the plaintiff can establish that an "affirmative link" exists between the alleged constitutional violation and either the sheriff's "personal participation, his exercise of control or direction, or his failure to supervise." Meade, 841 F.2d at 1527-28 (10th Cir. 1988). Plaintiff has failed to meet this burden.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that the stay imposed by this Court on November 8, 1995, is lifted; that Plaintiff's First Amendment claims that he was denied religious services as well as radio and television are dismissed as frivolous; that Defendants' motions for summary judgment (Doc. #19-2 and #29-1) are **granted,** and that Plaintiff's motion for summary judgment (Doc. #24) is **denied.** Defendants' motion to dismiss for failure to state a claim (Doc. #19-1) is **denied** as moot. Defendants' motion for attorney fees is **denied.**

SO ORDERED THIS 7 day of August, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANET E. SNEAD,
SS# 524-82-6327,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security Administration,

Defendant.

NO. 95-C-645-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 8th day of AUG., 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

13

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JANET E. SNEAD
SS# 524-82-6327
Plaintiff,

v.

SHIRLEY S. CHATER,[1] Commissioner
Social Security Administration,
Defendant.

NO. 95-C-645-M

ORDER

Plaintiff, Janet E. Snead, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the

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[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2] Plaintiff's application for disability benefits protectively dated October 27, 1993 and her November 30, 1993 application for Supplemental Security Income were denied February 24, 1994. The denials were affirmed on reconsideration. A hearing before an ALJ was held on October 13, 1994 after which a denial decision was issued on November 22, 1994. The Appeals Council affirmed the findings of the ALJ on May 16, 1995. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court therefore incorporates that information into this order as duplication would serve no useful purpose.

At the time of her hearing Plaintiff was 40 years old. She claims she has been unable to work since October 15, 1992 due to right shoulder and lumbosacral pain, and also because of nervousness. The ALJ determined that Plaintiff is able to return to her past relevant work as a self-service station attendant at the light exertional level. Accordingly, the ALJ determined Plaintiff was not "disabled" within the meaning of the Social Security Act.

Plaintiff alleges the record does not support the determination of non-disability by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff argues that the ALJ: (1) failed to make the requisite findings concerning her past relevant work; (2) improperly questioned the vocational expert; and (3) failed to properly evaluate Plaintiff's allegations of pain.

In accordance with *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 359 (10th Cir. 1993) and SSR 82-62, the ALJ is required to inquire into the demands of Plaintiff's past relevant work, to compare those demands to Plaintiff's residual functional capacity and to make appropriate findings. *Henrie*, 13 F.3d at 361. It is well-established that the ALJ has a basic obligation in every Social Security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised. *Henrie*, 13 F.3d at 360. This duty requires the ALJ to review the Plaintiff's residual functional capacity and the demands of her past work. Review of the record reveals that the ALJ made no inquiry of Plaintiff regarding the demands of her past work as a self-service station attendant, nor is a description of those demands contained elsewhere in the record. The absence of this information is plainly violative of the duty espoused in *Henrie* and SSR 82-62. The record does not contain sufficient information to support a finding that Plaintiff could return to her past relevant work as a self-service gas station attendant.

Ordinarily such an omission would constitute reversible error. *Cf., e.g., Washington v. Shalala,* 37 F.3d 1437, 1442-43 (10th Cir. 1994); *Henrie,* 13 F.3d at 361. However, in this case the ALJ elicited testimony from the vocational expert

which establishes the prevalence of occupations Plaintiff could perform given her age, education, work experience and residual functional capacity [R. 57-58]. This is the type of evidence properly used to resolve the question of disability at step-5. *See generally*, 20 C.F.R. §§ 404.1520(f), 404.1566, 416.920(f) and 416.966. The vocational expert testified that there are unskilled light and sedentary assembly positions including assembly type positions, hand packaging and filing jobs, and janitorial positions in Oklahoma and nationally that one with Plaintiff's vocational profile and residual functional capacity could perform. Based on the vocational expert's testimony, the ALJ found: "[a]lternately, even if she could not return to her past relevant work, she is not disabled because there is other work she could nevertheless perform." [R. 20]. The Court finds the ALJ's conclusion in this regard to be supported by substantial evidence. See *Morell v. Shalala*, 43 F.3d 1388 (10th Cir. 1994) (approving Secretary's practice of making alternative step-5 findings).

The Court finds that the hypothetical question asked of the vocational expert was proper. Plaintiff objects to the question because the ALJ asked the vocational expert to assume Plaintiff could perform light work. According to Plaintiff, an assumption that a claimant can perform a category of work begs the question and ignores the purpose of vocational expert testimony, which is to assess whether jobs exist for a person with the claimant's precise disabilities. *See Gilliam v. Califano*, 620 F.2d 691, 694 n.1 (8th Cir. 1980).

It is true that the ALJ asked the vocational expert to "assume that the hypothetical claimant has the physical capacity to perform work at the light exertional

level." [R. 57]. However, the ALJ modified that assumption:

> with the following limitations; the claimant exhibits symptomatology which includes pain from a variety of sources including her lower back, her right shoulder, her left wrist, and her hip which varies in severity from mild to moderate to occasionally chronic that would be of sufficient severity to be noticeable to her at all times but would not prevent her from being attentive to her job or being responsible to supervision or being cooperative with co-workers, so that she could carry out routine work responsibilities in a satisfactory manner; . . . *Id.*

The hypothetical did not ask whether one with an ability to do light work could do light work as Plaintiff suggests. Rather, the ALJ's hypothetical properly set forth impairments which were accepted as true by the ALJ. *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).[3]

Plaintiff claims that the ALJ erred by excluding some of Plaintiffs impairments from the hypothetical question, thus requiring reversal. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court notes that the record contains a letter dated

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[3] In an unpublished opinion dated August 16, 1995, the Tenth Circuit found no error in a similar hypothetical question. In *Pauley v. Chater*, 1995 WL 490281, *2 (10th Cir. (Okla.)) the ALJ asked the vocational expert to assume Plaintiff had the physical capacity for light and sedentary work with a list of restrictions.

January 5, 1994, written by the family doctor who had treated Plaintiff since October 1990. Plaintiff's doctor stated: "In my opinion, the only thing that interferes with her ability to do is heavy lifting or carrying, but she has no problem with sitting, standing, walking, speaking, traveling, and/or mental activities. She has obesity and anxiety." [R. 134]. The Court finds the limitations included in the hypothetical to be supported by substantial evidence.

Plaintiff claims that the ALJ failed to apply the appropriate standards in the evaluation of her pain and credibility. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 8th day of August, 1996.

Frank H. McCarthy
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES J. HOPKINS,
SS# 445-54-2960,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security Administration,

Defendant.

NO. 95-C-489-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 8th day of AUG., 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

13

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES J. HOPKINS,
SS# 445-54-2960,

Plaintiff,

v.

SHIRLEY S. CHATER,[1] Commissioner
Social Security Administration,

Defendant.

NO. 95-C-489-M

ORDER

Plaintiff, Charles J. Hopkins, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits[2]. In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. § 405(g) is to determine whether there is substantial evidence in the record to

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[2] Plaintiff's applications for Supplemental Security Income dated October 20, 1993 and his application for disability benefits protectively dated September 28, 1993 were denied January 28, 1994. The denials were affirmed on reconsideration. A hearing before an ALJ was held on July 5, 1994 after which a denial decision was issued on September 29, 1994. The Appeals Council affirmed the findings of the ALJ on March 23, 1995. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court therefore incorporates that information into this order as duplication would serve no useful purpose.

Plaintiff was 40 years old at the time of his hearing. He claims he has been unable to work since November 1992 due to pain in his back, legs, shoulders and neck. The ALJ determined that Plaintiff is able to return to his past relevant work either as a light truck driver or telephone clerk. Accordingly, the ALJ determined Plaintiff was not "disabled" within the meaning of the Social Security Act.

Plaintiff alleges the record does not support the determination of non-disability by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff argues that: (1) the Appeals Council failed to credit the additional medical records submitted to it with the appropriate weight; (2) the ALJ failed to develop the record concerning the demands of Plaintiff's past work; and (3) the finding that Plaintiff retains the residual functional capacity ("RFC") for light work is erroneous.

Plaintiff suffered a shotgun wound to his right knee in 1977. [R. 127-132]. The medical records developed at that time predicted Plaintiff would have severe motor deficit, a markedly swollen right leg with venous congestion, and that the leg would probably have to be amputated. [R. 131-32]. However, the leg was not amputated and despite his impairment, the record reflects that Plaintiff worked at a variety of occupations including brick layer, cook, school bus driver, janitor, delivery person, telephone clerk, and materials handler. [R. 43-45, 104, 114]. Referring to Part V of the disability report Plaintiff completed, the Court notes Plaintiff's statement that: "most of the jobs I had were manual labor jobs" [R. 114] and he did "heavy lifting in various manual labor jobs." [R. 115]. According to the vocational expert, the exertional level of Plaintiff's past jobs ranged from heavy work as a materials handler to sedentary work as a telephone clerk. [R. 58].

A longstanding impairment which has not dramatically changed since a time period when claimant was working should not be the basis for an award of benefits.

Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971). There is no basis in the medical record for a conclusion that Plaintiff's leg impairment has undergone a dramatic change since he last worked.

Plaintiff testified that he hadn't really seen any doctors for treatment of his leg since he was shot in 1977. [R. 58]. He takes Advil for pain relief, which he said helps a little bit until it wears off. [R. 47-8]. In December 1993 Plaintiff was involved in an automobile accident after which he began seeing a chiropractor, Dr. Schoborg, for treatment of neck, shoulder and back pain. However, due to an inability to pay, his last treatment was in February, 1994. [R. 57, 153].

Plaintiff was examined by consultative physician Dr. Calhoun on December 3, 1993. Dr. Calhoun found Plaintiff to have slightly decreased muscle mass in the right calf and lower leg compared to the left, but muscle mass and tone were otherwise normal. He had good grip strength bilaterally and good range of motion in the left ankle, knee, wrist and elbow, and at the right knee, wrist, and elbow. In the right lower leg he did not have an ankle jerk and had decreased knee jerk. He also had reduced sensation below the knee on the right as compared to the left. [R. 133-34].

After the ALJ rendered his decision, Plaintiff sought treatment of his leg pain at the University of Oklahoma Adult Medicine Clinic. Those records submitted to the Appeals Council, document three appointments, September 28, October 10, and November 23, 1994. [R. 7]. The findings recorded are similar to those of Dr. Calhoun. [R. 14-17]. While there is no diagnosis of depression, Plaintiff was prescribed Elavil (antidepressant) and Lodine for pain. [R. 11]. It appears that

Naprosyn was later substituted for the Lodine. [R. 7]. The clinic records reveal Plaintiff's statement that Naprosyn helped alleviate the pain, but it worsens before the next time to take it. The dosage was increased and there is no indication in the record whether this was effective. [R. 9]. There is a single statement in the clinic records that Plaintiff "has severe disability." [R. 11]. There is, however, no attempt to connect that statement to Plaintiff's functional ability to perform any task. The Court finds substantial support in the record for the Appeals Council's conclusion that the Adult Medicine Clinic records are consistent with those of record before the ALJ and do not provide any basis for changing the ALJ's decision.

Plaintiff contends that the ALJ failed to properly evaluate the demands of Plaintiff's past relevant work in accordance with *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 359 (10th Cir. 1993) and SSR 82-62.

As relevant to this case, SSR 82-62 requires that the ALJ fully develop the factual record regarding the claimant's residual functional capacity (RFC) and the claimant's past relevant work (PRW), make specific findings of fact regarding the claimant's RFC and PRW and then compare the two to determine if the claimant's RFC would permit a return to his or her PRW. Thus, SSR 82-62 requires the ALJ to engage in two broad functions: the first being fact finding regarding the claimant's prior work and current residual functional capacity and the second being recording the specific findings of fact in the decision comparing those matters.

This Court notes that *Henrie* was primarily concerned with the ALJ's failure to develop sufficient facts in the record regarding the claimant's PRW. The *Henrie* Court

noted that the record was simply devoid of any evidence on these issues and based upon that lack of evidence, found reversal and remand necessary.

With regard to the development of the factual record concerning the claimant's prior relevant work, SSR 82-62 states as follows:

> The claimant is the primary source for vocational documentation, and statements by the claimant regarding past work are generally sufficient for determining the skill level, exertional demands and nonexertional demands of such work. Determination of the claimant's ability to do PRW requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles,* etc., on the requirements of the work as generally performed in the economy.

In accordance with SSR 82-62 the ALJ questioned Plaintiff about his past work and Plaintiff told the ALJ he worked "just answering the phones, you know, taking different orders, you know, for telephones and stuff like that." [R. 45]. Plaintiff was also asked to explain what limitations prevented him from returning to work. Plaintiff's only assertion was that he was limited by pain. [R. 46]. The ALJ extensively and appropriately analyzed the pain asserted by Plaintiff and conducted the appropriate legal analysis with regard to that assertion. The ALJ rejected Plaintiff's assertion of disabling pain and set forth specific reasons for that rejection. Based upon the ALJ's pain analysis and the Plaintiff's brief description of his work as

a telephone clerk, the Court finds that, although sparse, the record is sufficiently developed with regard to Plaintiff's PRW, and his RFC to enable the Court to conclude that the ALJ's decision is supported by substantial evidence.

In addition to development of the record, SSR 82-62 requires that specific findings be included in the decision:

> In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain, among other findings, the following specific findings of fact:
> 1. A finding of fact as to the individual's RFC.
> 2. A finding of fact as to the physical and mental demands of the past job/occupation.
> 3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

The importance of the specific findings of fact lies in their utility for the Court in adhering to its limited role in reviewing Social Security appeals. The Court is not to reweigh the facts or exercise discretion in Social Security appeals. The Court's function is to determine if there is substantial evidence to support the decision and to determine if the correct legal standards were applied. *Musgrave, supra.* at 1374. In the absence of specific findings of fact, the Court has difficulty confining its review to the appropriate parameters and runs the risk of engaging in fact finding and discretionary judgments on its own. The *Henrie* Court did not address itself to the second issue set forth in SSR 82-62 regarding the necessity for specific findings of fact, nor has the Tenth Circuit addressed the degree of detail to be included in the

findings or the rationale which SSR 82-62 requires to be included in the Secretary's decision.

The decision in this case contains findings responsive to the requirements of SSR 82-62. As to Plaintiff's RFC, the ALJ stated: "Claimant has the residual functional capacity to perform a full range of light work." [R. 34]. Concerning the physical and mental demands of Plaintiff's past work and his ability to return to that work, the ALJ found: "Claimant's impairment(s) and residual functional capacity does not preclude claimant from performing claimant's past relevant work as a light truck driver or [sedentary][3] telephone clerk." *Id.* Although SSR 82-62 can be read to require more detailed findings and analysis than contained in the present decision,[4] the Court cannot say that the decision failed to minimally comply with the dictates of SSR 82-62.

Plaintiff maintains that the ALJ erred in finding he has an RFC for the full range of light work which involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. A job within the light work classification may also require a good deal of walking or standing. 42 CFR 21 § 404.1567(b). According to Plaintiff, the ALJ was essentially bound to accept the uncontradicted findings made by Dr. Charles D. Harris in his completion of an RFC

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[3] In the text of the decision at page 33 of the record, the ALJ mentioned and apparently accepted the vocational expert's testimony that the telephone clerk position was sedentary.

[4] See generally *Salts v. Sullivan*, 958 F.2d 840 (8th Cir. 1992); *Kirby v. Sullivan*, 923 F.2d 1323 (8th Cir. 1991); *Groeper v. Sullivan*, 932 F.2d 1234 (8th Cir. 1990); *Nimick v. Secretary of Health and Human Services*, 887 F.2d 864 (8th Cir. 1989). These cases require strict literal compliance with SSR 82-62.

assessment during the reconsideration step of the administrative process. Assuming, arguendo, that Plaintiff is correct, the Court notes that Dr. Harris's RFC for Plaintiff is consistent with a capacity for sedentary work. [R. 81-88]. One of Plaintiff's past relevant positions was a telephone clerk, a sedentary position. [R. 33, 58]. Even if the ALJ's determination that Plaintiff can perform his past relevant work as light truck driver was erroneous, the finding that he can perform the past relevant work of telephone clerk has substantial support in the record.

Plaintiff argues that a finding that he can perform work at even the sedentary level is not supported by the record because it is contrary to his testimony. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds that the ALJ and Appeals Council evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the

ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 8th day of August, 1996.

Frank H. McCarthy
Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KATHRYN L. BEHM; THOMAS PAUL BEHM; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-529-K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Small Business Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 8 day of August, 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CDM:css

14

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHIRLEY A. WEST,
SS#: 448-36-1555

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

Case No. 95-C-955-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Commissioner has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG - 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHIRLEY A. WEST,
SS#: 448-36-1555

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,

Defendant.

Case No. 95-C-955-J

ENTERED ON DOCKET

DATE AUG 12 1996

ORDER[1/]

Plaintiff, Shirley West, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts error because (1) the ALJ failed to properly consider Plaintiff's mental impairment, (2) the ALJ's finding that Plaintiff could perform her past relevant work was not supported with substantial evidence, and (3) the ALJ failed to provide Plaintiff with a fair hearing. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[2/] Plaintiff filed an application for disability and supplemental security insurance benefits on October 21, 1993. [R. at 36]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (hereafter, "ALJ") was held September 19, 1994. [R. at 478]. By order dated November 29, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 15-20]. Plaintiff appealed the ALJ's decision to the Appeals Council. On August 25, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born February 21, 1937, and at the time of her hearing before the ALJ was 57. [R. at 481]. Plaintiff completed high school and twelve hours of college credit. Plaintiff's previous work experience includes work as a contact lens technician, a doctor's assistant, an office manager, a receptionist, and a clerical worker. [R. at 78, 482].

Plaintiff claims that she is no longer able to work due to her heart condition,[3/] dizziness, stiff joints, and "nerves." [R. at 84, 483-84].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

[3/] Plaintiff had open heart surgery in 1990.

[4/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Four. The ALJ found Plaintiff's testimony was not fully credible due to Plaintiff's lack of treatment, the absence of complaints by Plaintiff to physicians, the lack of medications prescribed to Plaintiff, and the notes and records of Plaintiff's treating physicians. The ALJ additionally noted that Plaintiff testified that she could lift a

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[5/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

gallon of milk (8.8 pounds), and could stand for two to three hours (if permitted to move around). [R. at 487, 498]. The ALJ concluded based on her medical record and testimony that Plaintiff had no specific limitations. However, because of Plaintiff's prior coronary artery bypass surgery, the ALJ limited Plaintiff's ability to work to the "light" level. Based on the testimony of a vocational expert and Plaintiff's description of her past relevant work, the ALJ concluded that Plaintiff could perform her past work as a doctor's assistant or receptionist. [R. at 18].

IV. REVIEW

Plaintiff's Mental Impairment

Plaintiff initially alleges that the ALJ failed to evaluate Plaintiff's mental impairment. Plaintiff asserts that when the record contains evidence of a mental impairment which prevents an individual from working, the Commissioner must follow the established procedure for evaluating mental impairments.

The procedure for the evaluation of a mental impairment is explained in 20 C.F.R. 1520a. However, before the Commissioner is required to follow this procedure, the claimant has the burden to establish the existence of a mental impairment.

> If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs,

> symptoms, and laboratory findings, not only by your statement of symptoms.

20 C.F.R. § 404.1508. See also 20 C.F.R. § 404.1528 ("*Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.")(emphasis in original); 20 C.F.R. § 404.1512 ("In general, you have to prove to us that you are blind or disabled. Therefore, you must bring to our attention everything that shows that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are blind or disabled, its effect on your ability to work on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.").

Plaintiff asserts that her testimony establishes the existence of a mental impairment. Plaintiff did testify that she no longer can handle stress and cannot tolerate noise or people. Plaintiff also testified that she had not been treated for her stress-related difficulty. [R. at 486]. As noted above, a claimant's statements, absent some medical record, is insufficient to establish the existence of a mental disorder. See 20 C.F.R. §§ 404.1508, 404.1528, 404.1512. See, e.g., Bernal v. Bowen, 851 F.2d 297, 300 (10th Cir. 1988) ("The regulations provide, however that the claimant's own descriptions of his impairments is not sufficient to establish his disability under the Listings.").

Plaintiff claims that the record establishes that she was subject to multiple panic or anxiety attacks and chest pain. Plaintiff was seen by Dr. J.R. Alexander on February 7, 1990. Dr. Alexander noted that Plaintiff complained of anxiety or panic-type reactions, for which she had been prescribed Xanax. Plaintiff noted that the "attacks" usually occurred "only with stress or physical activity." [R. at 173]. The doctor also noted that Plaintiff had a strong family history of coronary artery disease. [R. at 173]. The doctor indicated that Plaintiff should be examined for coronary artery disease. Plaintiff was examined on February 11, 1990. [R. at 200]. On February 13, 1990, Plaintiff had surgery for coronary artery disease. The surgeon noted that Plaintiff's left, main coronary artery was 99% occluded, and her right, main artery was 70% occluded. [R. at 196]. On February 27, 1990, Plaintiff's doctor noted that she was recovering from her bypass "and is on limited activities at home. She is getting along very well, having no chest discomfort, panic attacks, or other symptoms. . . ." [R. at 171]. Plaintiff's records contain no other reports of "panic attacks." Although the record indicates that Plaintiff did have "panic attacks" prior to her heart bypass surgery, after her successful surgery in 1990, Plaintiff reported that she was experiencing no panic attacks.

Plaintiff also noted that she had been addicted to Xanax, and although she was no longer addicted (because she stopped taking Xanax), she had more difficulty dealing with stress while she was not taking Xanax. The record does not indicate who initially prescribed Xanax for Plaintiff. Dr. Alexander noted that when Plaintiff initially came to see him, she reported that her "panic attacks" had been well

controlled with Xanax. However, as noted above, the record does not indicate any panic attacks after Plaintiff's successful heart bypass surgery. Plaintiff's doctor continued to prescribe Xanax for Plaintiff (August 18, 1991), but noted that he wanted to cut back the amount of Xanax she was taking. [R. at 159]. By March of 1992, Plaintiff's use of Xanax was discontinued. Plaintiff was instructed to use Benadryl for withdrawal symptoms. [R. at 156]. Claimant's medications list, dated September 19, 1994, indicates Plaintiff is "currently" taking "Cardezem CD" for her "heart," "Zocar" for her "cholesterol," and "Ecotrim Aspirin" for "thin blood." [R. at 456]. Plaintiff's record indicates that she is no longer addicted to Xanax, and that she is not prescribed any medications for "stress."

Plaintiff additionally states that a consulting examiner found that Plaintiff suffered from "chronic anxiety/depressive state." Dan E. Calhoun, M.D., did examine Plaintiff, for the social security administration on January 17, 1994. He noted that Plaintiff told him she was depressed and that, according to Plaintiff, her doctor said she was depressed. Plaintiff additionally stated she had been on Xanax, but became "hooked" on it and was not taking any anti-depressants. [R. at 134]. Dr. Calhoun noted "chronic anxiety/depressive state" in his assessment. [R. at 135]. Dr. Calhoun's assessment was based solely on the statements of Plaintiff. Dr. Calhoun examined Plaintiff, but conducted no mental tests. The ALJ properly disregarded Dr. Calhoun's notation of "chronic anxiety" as not supported by the medical evidence.

Plaintiff's treating physician (for her heart), noted on August 31, 1992, that he asked Plaintiff whether she "might not be a victim of bipolar disease." Plaintiff

responded that "no she ha[d] been hyper all of her life." Her treating physician concluded that "I really think she is just a very difficult patient to deal with."

The ALJ noted that Plaintiff has never been treated for stress and that Plaintiff was taking no medication for stress. In addition, the ALJ observed that Plaintiff has the burden to prove a disabling mental impairment by objective medical testimony, and that unverified allegations by Plaintiff were insufficient for a finding of disability. The ALJ determined that Plaintiff had no medically determinable mental impairment. The ALJ's conclusion that the record contains insufficient evidence to support Plaintiff's claim of a mental impairment is supported by the record.

Failure to Make a Proper Step Four Evaluation

Plaintiff additionally asserts that the ALJ erred because the ALJ failed to properly evaluate Plaintiff's claims at Step Four. Plaintiff asserts that the ALJ failed to properly develop Plaintiff's mental impairment, which flawed the ALJ's Step Four analysis. Plaintiff additionally notes that the vocational expert testified that if Plaintiff had difficulty dealing with people and had stress she would be unable to perform her past relevant work.

As noted above, the ALJ's determination that Plaintiff did not have any limitations from her asserted "mental impairment" is supported by substantial evidence. Consequently, the ALJ did not err by not including Plaintiff's alleged "mental impairment" in his Step 4 analysis.

"Full and Fair Hearing"

Plaintiff asserts that the ALJ failed to give a "full and fair hearing" to Plaintiff because he did not develop the record with respect to Plaintiff's mental impairment and because he was not paying attention at the hearing.

The ALJ does make the statement, during the hearing, "[i]s it my turn? I wasn't awake." [R. at 499]. However, the Court cannot conclude, from this isolated statement, that the ALJ did not provide Plaintiff with a fair hearing, and that the ALJ did not pay attention during the hearing. Because the conclusions of the ALJ are supported by substantial evidence, the ALJ's determination that Plaintiff is not disabled is **AFFIRMED**.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 8 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY JOE HILL,)
)
Petitioner,)
)
vs.) No. 95-CV-439-H
)
RON WARD,)
)
Respondent.)

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for consideration. Petitioner challenges the award and computation of time credits by the Oklahoma Department of Corrections (DOC). He alleges (1) that Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the amended earned-time credit statute) is an ex post facto law as applied to him and violates due process and equal protection, and (2) that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto law. Petitioner requests that his credits be calculated under the statute in effect on the date he was convicted--i.e., the 1981 version of the earned-time credit.

I. BACKGROUND

In Turnham v. Carr, the Tenth Circuit Court of Appeals summarized the statutory provisions at issue in this case and the changes implemented by the DOC as a result thereof.

> Effective November 1, 1988, the State of Oklahoma substantially amended its inmate earned-time credit statute. Under the preamended version of the law, each prisoner received credits according to the job or

activity to which he was assigned. Some jobs earned inmates three credit days for each day worked; others rewarded prisoners one-for-one. The statute also awarded inmates 20 credit days for each pint of blood that they donated, up to a maximum of 80 credit days per year.

The amended statute significantly altered this system. Each inmate now earns credits according to his time spent in one of four classifications. For instance, an inmate earns 44 credits for spending a month in Class 4, whereas he earns no credits for time spent in Class 1. Okla. Stat. Ann. tit. 57, 138(D)(2) (West Supp.1994). Inmates are assigned to a specific class level based on a variety of factors, including "rehabilitation, obtaining job skills and educational enhancement, participation in and completion of alcohol/chemical abuse programs, ... work attendance and productivity, conduct record, participation in programs, cooperative general behavior, and appearance." Id. 138(B). The amendments also eliminated the opportunity for inmates to earn credits by donating blood.

In Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals held that application of the amended statute to inmates convicted prior to November 1, 1988, "runs afoul of the prohibition of ex post facto laws." Id. at 95. The same court clarified its Ekstrand holding in State ex rel. Maynard v. Page, 798 P.2d 628 (Okla. Crim. App. 1990), where it stated that an inmate in Oklahoma was "entitled only to credits which were allowed under the law on the date the crime giving rise to his conviction was committed." Id. at 629.

After Ekstrand and Page, the DOC revised its system of awarding credits to permit inmates who committed their offense of conviction before November 1, 1988, to petition the Department for credits earned under the preamended version of the statute. The DOC, however, would not apply such credits to an inmate's sentence until 30 days before his discharge. Moreover, the DOC required the inmates themselves to keep track of the credits they earned under the old law.

In Scales v. Brewer, Unpub. Op., Case Nos. CIV-90-369-S and CIV-90-375-S (E.D. Okla., Apr. 7, 1993), the District Court for the Eastern District of Oklahoma adopted the findings of a federal magistrate judge who ruled that the DOC's new procedure for awarding time credits was also unconstitutional. The magistrate ruled that the DOC's application of the statute was ex post facto as applied to inmates who committed their offense

> of conviction before November 1, 1988, because it put such prisoners "at risk of continued confinement beyond their discharge date." Id. at 5.
>
> Following Scales, the DOC again revamped its system of awarding time credits. The DOC now tabulates for each inmate how many credits he has earned under each version of the statute on a monthly basis and automatically awards the inmate the greater of the two totals.

Turnham v. Carr, 34 F.3d 1076, slip op. No. 94-5014, 1994 WL 413243 (10th Cir. Aug. 5, 1994) (unpublished opinion).

II. DISCUSSION

A. Work Credits

In the instant habeas action, Petitioner contends that the amended versions of sections 138 and 224 violate the Constitution's prohibition of ex post facto laws. Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be the subject of an ex post facto violation. If the credits under the 1981 statute exceed those under the 1988 amendments, Petitioner's sentence is reduced in accordance with the number of credits received under the 1981 statute for that month. If, on the other hand, credits under the 1988 statute are more advantageous, Petitioner's sentence is reduced in accordance with the 1988 statute for that month.

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). The DOC has

implemented a procedure whereby Petitioner's circumstances are evaluated on a monthly basis, and Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation. See Turnham, 1994 WL 413243, at *2 (10th Cir. Aug. 5, 1994) (unpublished opinion) (holding that the 1988 amendments to sections 138 and 124 were not ex post facto laws). Therefore, Petitioner is not entitled to habeas corpus relief for violation of the Ex Post Facto Clause.

B. Blood Credits

Next, Petitioner asserts that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto alteration of the length of his imprisonment. In the alternative, Petitioner asserts that the pre-amended statute created a liberty interest in the opportunity to earn credits for blood donations.

Respondent states that, because the blood donation program was suspended long before Petitioner's conviction, the elimination of blood donation credits does not amount to an ex post facto violation. This Court agrees. Therefore, Petitioner is not entitled to habeas relief under the ex post facto clause.

Nor is Petitioner entitled to relief on the ground that he has a liberty interest in earning credits by donating blood. The Supreme Court recently reformulated the test for determining

whether a state law creates a protected liberty interest. See Sandin v. Conner, 115 S.Ct. 2293 (1995). In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnel, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976). Under Sandin, therefore, courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301.

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in this case. The inability to earn credits by donating blood does not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301. Petitioner alleges no law or facts that suggest the basis for any reasonable expectation on his part of a right to earn credits by donating blood. Therefore, the petition for a writ of habeas corpus must be denied as to this ground as well.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus is hereby **denied**.

IT IS SO ORDERED THIS 9TH day of August 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 8-12-96

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. Civil No. 4:94-CV-01094
	)	
STEVEN BALE, JANICE BALE, EVELYN JEAN BALE, SJNS TRUST, FAITH ENTERPRISE TRUST, CORNERSTONE BANK, and GREEN COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION,	)	
	)	
Defendants.	)	

FILED
AUG 9 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATED JUDGMENT

It is hereby stipulated and agreed by the plaintiff, United States of America, and the defendants Steven Bale, Janice Bale and Evelyn Jean Bale, that the plaintiff have judgment against each of these defendants on its complaint in the amount of $35,616.47, plus interest thereon accruing after September 21, 1992, pursuant to 26 U.S.C. Sections 6601, 6621 and 6622, and 28 U.S.C. Section 1961(c). The parties are to bear their respective costs, including any

possible attorney's fees or other expenses of this litigation.

APPROVED:

Stephen C. Lewis
United States Attorney

Martin M. Shoemaker
Trial Attorney, Tax Division
U.S. Department of Justice
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(918) 587-8300

Attorney for Defendants Steven Bale, Janice Bale and Evelyn Jean Bale

IT IS SO ORDERED.

Date: August 9, 1996

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
AMERICAN BEAUTY PRODUCTS COMPANY, INC. Debtor,	BANKRUPTCY COURT CASE NO. 95-01875-W
UNITED STATES OF AMERICA, Appellant,	DISTRICT COURT CASE NO. 96-C-208-H
vs.	
AMERICAN BEAUTY PRODUCTS COMPANY, INC., Appellee.	

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankrutcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed and an advisory hearing was held before the undersigned on July 2, 1996.

Appellant, United States of America, challenges the Bankruptcy Court's confirmation of a Chapter 11 Plan of Reorganization as violative of the Absolute Priority Rule embodied in 11 U.S.C. §1129(b)(2)(ii). The United States seeks reversal of the Bankruptcy Court's confirmation and dismissal of the debtor's Chapter 11 case.

Citing *Matter of Manges*, 29 F.3d 1034 (5th Cir. 1994), *cert. denied* __ U.S. ___, 115 S.Ct. 1105, 130 L.Ed.2d 1071 (1995), Appellee American Beauty Products Company, Inc. asserts that this appeal should be dismissed as moot. Although the

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appeal was timely filed, the United States did not obtain a stay pending the appeal. Since the appeal was filed, the Plan has been substantially consummated in that transfer of all, or substantially all, of the property has occurred and payments as required under the Plan have been commenced. On May 22, 1996 the Bankruptcy Court entered a Final Decree closing the case pursuant to Fed.R.Bankr.P. 3022. [Dkt. 5, Exhibit A].

In the context of Chapter 11 bankruptcy proceedings mootness refers not to the Article III inquiry as to whether a live controversy is presented; rather, it addresses equitable concerns unique to bankruptcy proceedings. Here mootness is a prudential consideration in which the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the implementation of a reorganization plan are balanced against the competing interests that underlie the right of a party to seek review of an adverse bankruptcy order. *Id.* at 1038-39. The fact that a plan has been substantially consummated does not necessarily make it impossible or inequitable for an appellate court to grant effective relief. However, as a number of courts have recognized, "a plan of reorganization, once implemented, should be disturbed only for compelling reasons." *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (collecting cases), *cert. denied*, ____ U.S. ___, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994). The Seventh Circuit asks whether it is "prudent to upset the plan of reorganization at this late date." *Id.* To determine whether an appeal should be dismissed as moot, the Fifth Circuit considers: (1) whether a stay has been obtained; (2) whether the plan has been substantially

consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *Manges*, 29 F.3d at 1039. Applying those considerations to the present case, the Court concludes that this appeal should be dismissed as moot.

At the hearing the parties agreed the plan had been substantially consummated. Pursuant to the plan, payments have been made to parties not before the Court, including taxing authorities of seven states and installment payments have commenced to the Internal Revenue Service and Small Business Administration on whose behalf the United States is prosecuting this appeal. Based on these facts the Court concludes that it would be imprudent to attempt to upset the substantially consummated plan of reorganization.

The undersigned United States Magistrate Judge recommends this appeal be DISMISSED AS MOOT.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 9th day of July, 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GLENDA H. ISOKARIARI,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 93-C-960-W

ORDER

This case is remanded to the agency to allow the ALJ to give his reasons for disregarding the opinions of claimant's treating physicians regarding her moderately severe sciatica and the level of her depression, and to complete a psychiatric review technique form, and discuss the evidence he relied on in completing it, should he choose to do so without the assistance of a medical advisor, or obtain such a review by a medical advisor.

Dated this 8th day of August, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: remanded

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GLENDA H. ISOKARIARI,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 93-C-960-W

JUDGMENT

Judgment is entered in favor of the plaintiff, Glenda H. Isokariari, in accordance with this court's Order filed August 8, 1996.

Dated this 8th day of August, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: remanded

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANICE DOE, by Next Friend Sally Doe; SALLY DOE and SAM DOE, as parents of Janice Doe,	)	
Plaintiffs,	)	
v.	)	Case No. 96-C-613-H
INDEPENDENT SCHOOL DISTRICT NO. 9 OF TULSA COUNTY, OKLAHOMA (UNION PUBLIC SCHOOLS),	)	
Defendant.	)	

ORDER

This matter comes before the Court on Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction (Docket #4) pursuant to 20 U.S.C. § 1415(e)(3). A hearing was held in this matter on July 10-11, 1996.

Findings of Fact

1. Janice Doe is a minor child who is eligible for special education and related services and resides in the Union Public School District ("Union"). She enrolled in kindergarten at Union in the fall of 1991.

2. In January 1992, Janice's mother, Sally Doe, requested a due process hearing against Union under the Individuals with Disabilities Education Act ("IDEA"), challenging the educational placement of her daughter. A hearing was commenced before an independent hearing officer selected

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by the Oklahoma State Department of Education.

3. On March 16, 1993, prior to the conclusion of the due process hearing, Sally Doe and Union entered into a settlement agreement ("the Agreement"). At the time the Agreement was executed and thereafter, through May 1996, Janice was attending and has attended a private school in the Tulsa area (the "Private School").

4. The Agreement provided in pertinent part as follows:

> 2. [Janice] will be placed by agreement at [Private School] for the 1993-94 and 1994-95 school years. When and if the services are provided by [Private School], the School District shall bear the following expenses arising from [Janice's] placement at [Private School]:
>
> > (a) [Janice's] tuition, materials and related services at [Private School] for the school years 1993-94 and 1994-95 and
> >
> > (b) extended school year services for [Janice] at [Private School] during the summers of 1993 and 1994, as deemed appropriate by [Janice's] I.E.P. team,
>
> subject to the following limitations. The School District will bear the expenses identified in Paragraph 2(a) and (b) up to a maximum of nine thousand dollars ($9,000) during the fiscal year period from July 1, 1993 through June 30, 1994 and from July 1, 1994 through June 30, 1995. Private School will invoice the School District, and the School District will pay Private School directly for these expenses. Regardless of the date an invoice is received, that invoice will be deemed due and payable only during the fiscal year in which the invoiced service is provided. Any amounts invoiced by Private School that exceed nine thousand dollars ($9,000) during either fiscal year period will be the sole responsibility of [Janice's parents].

Joint Ex. 1 at 2.

5. Pursuant to the terms of the Agreement, Union paid for the tuition and related services at Private School through the end of May 1995.

6. On May 25, 1995, Dr. Bonnie Johnson, Union's School Psychologist, sent a letter to Sally Doe, which stated in relevant part as follows:

> According to the settlement agreement signed with the Union Public School on March 19, 1993, all financial obligations of this school district cease June 30, 1995. We will conduct a Review/IEP meeting following [Janice's] re-evaluation to determine appropriate school placement and services for next year.

Joint Ex. 10 at 2.

7. Union did not pay for any tuition and related services for Janice during the summer of 1995 or the 1995-96 school year.

8. On September 13, 1995, Sam and Sally Doe requested a due process hearing concerning Janice's educational placement. Joint Ex. 17. Such hearing was commenced on April 22, 1996, and concluded on June 17, 1996. At the conclusion of the hearing, the hearing officer set a briefing schedule. The hearing officer has not yet issued a ruling in the matter.

9. Union contends that it is under no obligation to pay either for any tuition and related services incurred by Janice at Private School during the 1995-96 school year or for any tuition and related services to be incurred by Janice at Private School during the 1996-97 school year..

Conclusions of Law

1. The IDEA gives parents a right to an impartial due process hearing on complaints with respect to the educational placement of their handicapped children. 20 U.S.C. § 1415(b)(2). The act also provides for state or federal judicial review of final administrative decisions. Id. § 1415(e)(2).

2. The IDEA contains a "stay put" provision which mandates that "during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." 20 U.S.C. § 1415(e)(3)(A).

3. The Supreme Court has described the language of section 1415(e)(3) as "unequivocal," in that it states plainly that "'the child shall remain in the then current educational placement.'" Honig v. Doe, 484 U.S. 305, 323 (1988) (quoting 20 U.S.C.§ 1415(e)(3)).

4. Section 1415(e)(3) is, in effect, an automatic preliminary injunction. Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). "The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." Id.

5. In Zvi D., the court recognized that, for purposes of determining a child's "current educational placement", "[p]ayment and placement are two different matters." 694 F.2d at 908. In that case, the child's parents and the public school entered into an agreement whereby the school would pay for the child's private education for a definite period of time pending an initial evaluation of the child by the public school. The agreement specifically stated, "This funding is being provided with the stipulation that a review of Zvi's classification will be conducted at the end of the current year with a view toward placing him in an appropriate public program in September, 1979." Id. at 907. Because the agreement expressly limited the public school's financial responsibility for private school tuition to the 1978-79 school year, the Second Circuit held that the private school was not Zvi D.'s "current educational placement" within the meaning of section 1415(e)(3).

6. In Jacobsen v. District of Columbia Board of Education, 564 F. Supp. 166 (D.D.C. 1983), the court held that absent an express agreement between the parents and the public school detailing the interim nature of the placement, the court would assume that the child's actual current educational placement constituted the child's "current educational placement" under the statute. Rejecting the public school's proposed placement of their child, the Jacobsen parents unilaterally

placed their child in a private school and commenced due process proceedings in August 1981. In February 1982, the public school advised the parents that it had made "an administrative decision to assume financial responsibility" for the child's private school education. Id. at 168. The letter noted that "[f]urther recommendations will be rendered as deemed appropriate." Id.

Distinguishing Zvi D., the Jacobsen court held that the private school was the child's current educational placement because the notification to the parents did not specifically limit the placement to the 1981-82 school year or put the parents on notice that another placement would be considered for the 1982-83 school year. Id. at 171. The court concluded,

> Since [the public school] failed to limit its financial responsibility, the parents were free to assume that [the public school] would continue to fund [the child] at [the private school] until a change in the placement made after a Notice of a Proposed Change in Educational Program, and the exhaustion of any proceedings challenging a new proposed placement. Accordingly, [the private school] was [the child's] "current placement" in 1981-1982.

Id. at 171-72.

7. In Evans v. Board of Education of the Rhinebeck Central School District, 921 F. Supp. 1184 (S.D.N.Y. 1996), the public school and parents reached an agreement that the school would pay for the child's private school education. The unwritten agreement did not include a definite time limitation. Id. at 1188. Distinguishing Zvi D., the court concluded that the private school was the "current educational placement" of the child for purposes of section 1415(e)(3).

8. The Agreement in the instant case specifically covered the 1993-94 and the 1994-95 school years. The Agreement was silent on any plans for Janice extending past May of 1995. Thus, the Agreement did not expressly place the parents on notice in the manner and to the extent required by the IDEA that another placement would be considered beginning with the 1995-96 school year.

Because Union failed to state affirmatively in the Agreement that Janice's placement at Private School would be re-evaluated at the end of the 1994-95 school year with a view toward placing her in an appropriate public program for the 1995-96 school year, the parents were entitled to assume that Union would continue to fund Janice's Private School education until such time as another placement was either agreed to by the parties or dictated by administrative and judicial proceedings.

9. The Court thus concludes that Private School is Janice's "current educational placement" for purposes of section 1415(e)(3). Pursuant to the terms of that provision, it is hereby ordered that Union shall pay for Janice's tuition and related services as set forth in the Agreement during the pendency of any state administrative proceedings and any subsequent judicial proceedings until such time as Janice's placement is changed in the manner prescribed by law. Plaintiffs' Motion for Preliminary Injunction (Docket #4) is hereby granted.

IT IS SO ORDERED.

This 8TH day of August, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY MCCLAIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-C-751-H
	)	
SOUTHWEST STEEL COMPANY, INC., a corporation,	)	
	)	
Defendant.	)	

JUDGMENT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Defendant Southwest Steel, Inc.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants and against Plaintiff.

IT IS SO ORDERED.

This 8TH day of August, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOYLE ALLEN CLAGG,

Plaintiff,

v.

BUCK JOHNSON, ROGERS COUNTY, SHERIFF'S OFFICE,

Defendants.

Case No. 95-C-0372-H

ORDER

This matter comes before the Court on Defendants' motion to dismiss (Docket #6).

By order of Magistrate Judge McCarthy (Docket #9), Defendants' motion to dismiss was treated as one for summary judgment under Rule 56, and Plaintiff was given sufficient time to respond. Magistrate McCarthy's order also advised Plaintiff "of his right to file counter-affidavits or other responsive material and alerted [him] to the fact that failure to so respond might result in the entry of summary judgment against him." This order was filed December 14, 1995.

In a subsequent Report and Recommendation (Docket #10), Magistrate McCarthy stated that "[t]he order was returned to the courthouse stamped 'undeliverable as addressed--no forwarding order on file.'"

Accordingly, the Court accepts Magistrate McCarthy's recommendation that Plaintiff's action be dismissed without prejudice for lack of prosecution.

Defendants' motion to dismiss is hereby granted.

IT IS SO ORDERED.

This 9TH day of August, 1996.

Sven Erik Holmes
United States District Judge

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